

1 NATIONAL INDIAN GAMING COMMISSION

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3 NATIONAL INDIAN GAMING COMMISSION

4 PUBLIC HEARING ON THE PROPOSED

5 "CLASS II DEFINITIONS AND CLASSIFICATION

6 STANDARDS" FOR INDIAN GAMING

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11 U.S. Department of the Interior

12 Main Auditorium

13 1849 C Street, NW

14 Washington, D.C.

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17 10:00 a.m.

18 Tuesday, September 19, 2006

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2

1 INDEX

2 AGENDA: PAGE:

3

4 Opening 8

5

6 Prayer and Song - Ken Billingsley

7

8 Introductory Remarks 8

9

10 Phil Hogen, Chairman

11 National Indian Gaming Commission
12
13 Cloyce "Chuck" Choney, Commissioner
14 National Indian Gaming Commission
15
16 Panel 1 - Tribal Leadership 23
17
18 Brian Campbell, Administrator of Commerce
19 Chickasaw Nation
20
21 Tracie Stevens, Governmental Affairs
22 Tulalip Tribes

1 Charlie Lombardo, Sr., Vice President of
2 Gaming Operations
3 Seminole Tribe of Florida

4

5 Marjorie Mejiaa, Chairwoman

6 Lytton Band of Pomo Indians

7

8 Ray Halbritter, Nation Representative

9 Oneida Indian Nation

10

11 Public Comment

12

13 Panel 2 - State Governments and Testing Labs 70

14

Tom Gede, Executive Director

15 Conference of Western Attorneys General

16

Sharon Tolton-Reese, Deputy Director

17 Washington State Gaming Commission

18 Nick Farley, President

19 Nick Farley and Associates

20

21 Drew Pawlak, Vice President

22 BMM Testlabs

1 I N D E X

2	AGENDA:	PAGE:
3		
4	Panel 2 - State Governments and Testing Labs	70
5		
6	Public Comment	
7		
8	Panel 3 - Attorneys	118
9		
10	Michael Anderson	
11	Monteau Peebles	
12		
13	Elizabeth Homer Homer Law Office	
14		
15	Joe Webster Hobbs, Straus, Dean and Walker, LLP	
16		
17	Judy Shapiro	

18 Shapiro Law Office

19

20 Public Comment

21

22

5

1 Afternoon Session

2

3 Panel 4 - Manufacturers 171

4

5 Knute Knudson

6 IGT

7

8 Mark Lerner

9 Bally Technologies

10
11
12
13
14
15
16
17
18
19
20
21
22

Gary Loebig

Multi-Media Games

Ron Harris

Rocket Gaming Systems

Eric Casey

Planet Bingo

Public Comment

3	AGENDA:	PAGE:
4		
5	Panel 5 - Economic Impact	213
6		
7	Buford Rolin, Chairman	
8	Poarch Band of Creek Indians	
9		
10	Michael Marchand, Business Council Chair	
11	Confederated Tribes of the Colville	
12	Reservation	
13		
14	Ernie Stevens, Jr., Chairman	
15	National Indian Gaming Association	
16	Public Comment	
17		
18	Panel 6 - Tribal Leadership	257
19		
20	Paul Spicer, Chief	
21	Seneca-Cayuga Tribe of Oklahoma	
22		

1	Jim Ransom, Chief	
2	St. Regis Mohawk Tribe	
3		
4	Rogelio Elizondo, Treasurer	
5	Kickapoo Traditional Tribe of Texas	
6		
7	Erma Vizenor, Chairwoman	
8	White Earth Reservation	
9		
10	Mark Macarro, Chairman	
11	Pechanga Band of Luiseno Indians	
12		
13	Final Public Comments	283
14		
15	Concluding Comments	333
16	Phil Hogen, Chairman	

17 National Indian Gaming Commission

18

19 Adjournment

20

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1 PROCEEDINGS

2 (10:05

3 a.m.)

4 CHAIRMAN HOGEN: Please take your seats.

5 Good morning. I'm Phil Hogen, Chairman of the

6 National Indian Gaming Commission, and I want to

7 welcome all of you to this public hearing that

8 the Commission is holding in connection with its

9 effort to consider and perhaps adopt regulations
10 relating to the distinction between equipment
11 permissible for Class II gaming as opposed to
12 that that can be used when a compact is in place
13 for the conduct of Class III gaming.

14 This hearing process is a little unusual
15 for NIGC. Most often, we are having discussions
16 something like this out in Indian Country when we
17 consult with tribes and we attend gaming
18 meetings, but this is not unprecedented. When I
19 served on the Commission before, we had a public
20 hearing related to Internet gaming right here in
21 this same place.

22 We want to thank the Department of the

2 to us.

3 In terms of our agenda, we're on a fast
4 pace today. We have a lot of speakers that we
5 want to hear from. We're going to try and
6 rigidly control the times that each of the panels
7 take so that we can stay on schedule.

8 Commissioner Choney will outline the procedure we
9 will be following in that connection.

10 In terms of how we will proceed
11 following the rules, I'll make a brief statement
12 about my perspective with respect to this
13 process, then we will have our first panel which
14 will be a panel of tribal leaders.

15 The first panel will be a panel of
16 tribal leaders and following the presentation of
17 each of the panelists, we, Commissioner Choney
18 and I, may ask some questions of the panelists
19 and then, at the conclusion of all of the
20 panelists' testimony, we will open the floor here
21 for questions and comments by those of you, the
22 public. We would ask that when that occurs, you

1 use the mikes and identify yourself. Chuck will
2 go into that as well.

3 The second panel will be representatives
4 from state governments as well as some
5 representatives from some testing laboratories.

6 Then we'll have a panel of attorneys and then
7 we'll break for lunch following that panel, and

8 we'll commence after lunch with a panel of
9 manufacturers of these devices and equipment that

10 Class II games can be conducted with. We'll then
11 have a panel addressing economic impact and that

12 will consist of some tribal leaders, and then we

13 will have a panel of tribal leadership and then,

14 when that panel is finished, we will take further

15 public comment. Hopefully we'll be able to

16 conclude this, if we stay on schedule, at 5:30

17 this afternoon.

18 So, needless to say, it's going to be a

19 full day, but it is very significant to the

20 Commission and we want to listen carefully to all

21 that is said.

22 In keeping with our traditions, I'm

11

1 going to call on one of my Lakota brethren, Ken

2 Billingsley, our Regional Director from our

3 Phoenix Region, to offer a prayer.

4 So, if you'd please stand, Ken will lead

5 us in that.

6 Opening

7 MR. BILLINGSLEY: Thank you. Good

8 morning, everyone. As I sing this song, each of

9 you may pray to whoever it may be.

10 (Song.)

11 CHAIRMAN HOGEN: Thank you, Ken. At

12 this time, I'd like to introduce and call on

13 Commissioner Chuck Choney to go over the

14 procedural rules we will be following for this

15 hearing.

16 Introductory Remarks

17 COMMISSIONER CHONEY: Thank you,

18 Chairman Hogen.

19 Good morning, everyone, and welcome to

20 this hearing.

21 Every one of you have a handout that's

22 got the Interior Department's rules and

1 regulations on decorum. It also has directions
2 to the restroom facilities as well as to the
3 cafeteria. So, if you could refer to that when
4 you need it.

5 As Chairman Hogen mentioned a few
6 minutes ago, we're going to be on a severe time
7 constraint and we have a lot of people we need to
8 hear from before we make our final decision in
9 this rule. So, we're going to hope to stay on
10 schedule because I don't know about you, but I
11 don't want to be here at midnight.

12 All oral testimony, questions and
13 comments will be transcribed and videotaped and
14 thereafter will be made part of the public
15 record.

16 Due to the desire of the Commission to
17 accommodate the large number of panelists and
18 witnesses, strict time constraints for speaking
19 have been imposed. Each member of the six panels
20 will be allowed five minutes for their
21 introductory remarks and presentations. This

22 rule will be strictly adhered to by all

13

1 panelists.

2 During each panel's presentation, the
3 Commission may ask clarifying or pertinent
4 questions of each panel member. After each
5 panel's presentation, the public will be invited
6 to ask a question of the panelist or of the
7 Commission.

8 Each person speaking from the floor must
9 sign up with the microphone monitors, be
10 recognized by the chairman, must identify
11 yourself for the record and speak from the
12 microphones provided which are located down here
13 in the front at the end of each aisle. Each
14 commenter will be given two minutes to ask a

15 question or to make a comment.

16 The time limit for each panel and a two-
17 minute rule for each commenter during these
18 sessions will also be strictly followed.

19 After each panel adjourns, there will be
20 a 10-minute break. This will allow for the next
21 panel to be seated and to prepare for their
22 presentations.

1 The chairman will have the authority to
2 consider whether any question is relevant and
3 appropriate and if so, the witness shall answer
4 the question. All the questions submitted during
5 this hearing shall be retained and entered into
6 the public record.

7 The chairman, if warranted, may direct
8 specific questions to particular witnesses to be
9 responded to in writing for subsequent inclusion
10 into the hearing record.

11 Public comments following the final
12 panel will be for 60 minutes. This will be for
13 those persons who were unable to speak at the
14 conclusion of a previous panel as well as for
15 others who wish to speak or to make a comment or
16 ask a question. The two-minute rule for
17 commenters will still apply here.

18 The lunch break will be tentatively
19 scheduled from 12:50 p.m. to 1:50 p.m. or 60
20 minutes after the chairman adjourns for the lunch
21 break.

22 Chairman Hogen?

1 CHAIRMAN HOGEN: Thank you, Chuck.
2 Bingo and Class II gaming is the bedrock
3 on which the 23 billion plus Indian gaming
4 industry was built. It remains critically
5 important to those tribes located in states which
6 refuse to negotiate compacts or Class III gaming.
7 Several of those states clearly permit Class III
8 gaming activity elsewhere, yet steadfastly refuse
9 to deal fairly with tribes.

10 All tribes that negotiate with states
11 for gaming compacts needs the states to know that
12 there are viable Class II activities that tribes
13 can turn to if the compacted gaming activities
14 states offer are too constrained.

15 Tribes whose market opportunities exceed
16 the capacity of compacted gaming in their states
17 offer need viable Class II gaming to supplement
18 their compacted gaming activities. Those who
19 support this industry, especially those who
20 design, build and market the equipment with which

21 Class II gaming is conducted, need to know what
22 to build and offer to tribes so that the legality

16

1 of the gaming conducted with that equipment is
2 not in question, so that gaming licenses are not
3 at risk and so that tribes can make substantial
4 investments in gaming equipment without fear that
5 they will invest in equipment deemed unsuitable
6 for Class II gaming.

7 On September 15th and on September 26th
8 in 1988, the Senate and House of Representatives
9 changed the course of history when they passed
10 Senate Bill 555 and gave momentum to the Indian
11 gaming movement; in my opinion, the single most
12 effective economic development legislation in the
13 history of federal Indian policy.

14 When President Ronald Reagan signed IGRA
15 into law on October 17, 1988, tribes were
16 permitted to use slot machines and electronic
17 facsimiles in tribal gaming facilities to
18 generate funds to meet the many unmet needs that
19 had plagued Indian nations for generations.
20 Since that time, those gambling devices which
21 IGRA permitted have generated tens of billions of
22 dollars for tribal governments.

1 In IGRA, Congress divided permissive
2 gaming activities into three classes, three types
3 of gaming activities which had some qualitative
4 differences from one another: traditional
5 ceremonial gaming, the stick games, hand games,

6 and the like that tribes have played for hundreds
7 of years were placed in Class I, subject only to
8 tribal regulation.

9 At the time of IGRA's enactment, the
10 principal Indian gaming activity was bingo, in
11 many cases high-stakes bingo, as well as pull-
12 tabs and some poker games. This activity was
13 permissible where states hadn't outlawed such
14 gaming activity for everyone. IGRA directed
15 tribes to regulate it with federal oversight.

16 The casino gaming experience was seen in
17 a different light. Blackjack and other house
18 bank games, together with casino games, like
19 craps and roulette, as well as slot machines of
20 any kind, and electronic facsimiles of games of
21 chance, were placed in Class III. Those were
22 permissible only when tribes entered into

1 compacts with the state where they were located.

2 I don't know if the rationale for the
3 division of Class II and Class III was sound or
4 not, but Congress did this based on what they
5 knew at the time. There was something about
6 those casino facilities in Nevada and Atlantic
7 City where there were slot machines and bank card
8 games and table games that persuaded Congress
9 that such activity could only operate on Indian
10 lands where it was done in agreement with the
11 states.

12 If that dividing line is not supported
13 by reason or in logic or if it needs to be
14 changed, that change cannot and will not be made
15 by this regulatory agency. Rather, that is a
16 matter left to the discretion of Congress.
17 Congress knew that progress in technology
18 wouldn't stand still and they observed that
19 tribes should be permitted to take advantage of

20 that progress in their gaming activities.

21 Specifically, Congress provided that

22 tribes could use computers and technologic aids

19

1 in their uncompact Class II gaming. They

2 observed, however, that even though technology

3 could be utilized, the fundamental

4 characteristics of those Class II games needed to

5 be retained and that those games, even when

6 employing technologic advances, needed to be

7 clearly distinguishable from slot machines and

8 electronic facsimiles of games of chance.

9 I think Congress knew these distinctions

10 wouldn't always be easy to draw and that may have

11 been one of the reasons they created the National

12 Indian Gaming Commission and tasked it with

13 promulgating and enforcing federal standards in
14 this area.

15 I have attempted to study the
16 legislative history of IGRA very carefully to
17 learn what Congress intended in this regard. It
18 is clear to me from this study that the main
19 utilization Congress anticipated tribes to make
20 with technologic advances was to broaden
21 participation in bingo and similar games so
22 bigger prizes could be offered on a broader

1 scale, but I assume their expectations were not
2 solely limited to this approach.

3 Needless to say, with Class II gaming
4 continuing to have such importance, it is vital

5 to all concerned that the scope of what is
6 permitted in this class be clearly identified.
7 Today, it is not. If NIGC is to fulfill the
8 mandate Congress gave in directing it to write
9 federal standards, the parameters of Class II
10 gaming, especially as conducted with the
11 electronic player stations, needs to be better
12 defined.

13 NIGC advisory opinions, protracted and
14 expensive litigation, closure of tribal gaming
15 facilities, and imposition of million dollar
16 fines on gaming tribes is not the way to address
17 this issue. Rather, a fair, clear set of
18 standards, consistent with the intent of Congress
19 and the guidance of the several court opinions in
20 this area have given us, need to be adopted.

21 This is the task that lies before us and
22 that needs to be brought to an early conclusion,

1 and this Commission needs all the good advice it
2 can get and is thankful for all that good advice
3 it has received.

4 As you know, prior to this point, we've
5 proposed draft regulations, we've held
6 consultation sessions, and we've gone to lots of
7 meetings talking about where we are. I'm sure in
8 those consultation sessions, some 70+ that we
9 held, we said some different things; that is, we
10 tried to be consistent, but when you talk about
11 the same thing 70 different times, there probably
12 were some misstatements made by the Commission as
13 we discussed this with tribes.

14 In terms of the proposal, the amount of
15 time that it takes to play one of these games
16 would be about eight seconds plus, if you follow
17 what we've outlined in the proposal.

18 There's also reference to the amount of

19 space that has to be dedicated to the bingo games
20 as opposed to what might be bells and whistles or
21 slot machine reels and so forth.

22 If there are two video screens, we would

22

1 anticipate that one of the video screens would be
2 devoted to the bingo game and the other devoted
3 to the entertainment display. We don't intend
4 that an entire video screen be devoted to bingo,
5 if that's the only one that's there.

6 With respect to the process whereby
7 these devices or the prototypes would be sent to
8 laboratories for testing, currently in our
9 proposal is no process for the tribes to appeal a
10 decision that NIGC would make in that connection
11 and we may need to modify that, and we are

12 interested in hearing about specific proposals in
13 that connection.

14 Our proposal would not pertain to live
15 session bingo where you've got people playing on
16 paper cards. We are going to continue to receive
17 comments on these classification standards as
18 well as the technical standards that are
19 companions to them through the 30th of September.
20 After that, we'll look at everything that's been
21 received, decide are we going to go forward with
22 these regulations and, secondly, what they will

1 look like and, if so, if we go forward, we will
2 publish them in the Federal Register as final
3 regulations.

4 Upon their publication, they would be
5 effective, as would be stated in those
6 regulations, either within 30 or 60 days,
7 depending on the process we would follow, and
8 compliance with the regulations would then be
9 required within six months, although current
10 proposal then provides that a six-month extension
11 could also be requested.

12 And with respect to the games that are
13 in play today, many, if not most, of those that
14 are played as uncompact Class II games, in my
15 view, are not within the realm of Class II; that
16 is, they've crossed the threshold into a
17 facsimile of a game of chance, and there are many
18 games that were designed or submitted to NIGC and
19 we issued an advisory opinion that are being
20 utilized but not utilized consistent with what
21 that advisory opinion said. In most cases,
22 there's an auto-daub process that wasn't

1 incorporated in the opinion that makes it a one-
2 touch game.

3 We have not rushed out to do enforcement
4 with respect to those activities because we were
5 in this process. We'd much rather write
6 standards and have tribes comply with the
7 standards than take punitive action. None of
8 those one-touch machines that are out there are
9 subject of NIGC advisory opinions, at least
10 played in that format.

11 In terms of the economic impact of these
12 proposals, we are very seriously interested in
13 this. We are continuing to gather information,
14 paying people to crunch the numbers in this
15 connection and that will certainly be considered
16 as we reach our decision.

17 With respect to where the Department of

18 the Interior, where the Department of Justice
19 fits into this process, it's the National Indian
20 Gaming Commission that will be making this
21 decision, not either of those entities, and so
22 with that said, I would like the first panel to

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1 please come forward, the Panel of Tribal
2 Leadership, and I might say at this point, in
3 terms of the order of presentation, there's no
4 significance to that. Just come on up, folks, if
5 you would, please.

6 I don't know if we've done it
7 alphabetically or geographically or whatever, but
8 that shouldn't be any, I guess, rank associated
9 with the way we are having the presenters
10 present.

11 One of the other parties that's not
12 going to participate here is the Department of
13 Justice. The Department of Justice, of course,
14 has been often mentioned in the discussion of
15 this proposal because of their enforcement of the
16 Johnson Act, and, of course, if and when we go to
17 court, and it's very likely, if we have
18 regulations we'll go to court, they will be
19 representing us. They decided it would be more
20 appropriate not to in effect be on the record in
21 this connection and then be out there as our
22 advocate later on. So, they won't be

1 participating.

2 But with that said, I want to say to the

3 panelists here, the tribal leaders on this first
4 panel, thank you so much for coming, and we know
5 that you came here at some expense and that you
6 have given this a lot of thought and we're much
7 appreciative of this.

8 We have Brian Campbell, the
9 Administrator of Commerce with the Chickasaw
10 Nation, present. We have Tracie Stevens,
11 Governmental Affairs with the Tulalip Tribe.
12 Charlie Lombardo, Senior Vice President of Gaming
13 Operations with the Seminole Tribe of Florida.
14 Marjorie Mejia, the Lytton Band of Pomo Indians.
15 Ray Halbritter of the Oneida Nation from New
16 York.

17 We are ready to proceed. We'll start
18 with Brian Campbell. If you would make your
19 opening statement, please.

20 Panel 1 - Tribal Leadership

21 MR. CAMPBELL: Thank you, Chairman
22 Hogen, Commissioner Choney. Governor Anoatubby

1 sends his regards and apologies that he could not
2 be here today. As I mentioned, a tribal
3 legislator passed away and he attended her
4 service.

5 Thank you for this opportunity to
6 comment on the NIGC's proposed rule establishing
7 game classification standards.

8 Since the Indian Gaming Regulatory Act
9 was enacted in 1988, the Chickasaw Nation has
10 undergone an economic transformation of a
11 magnitude hardly imaginable a generation ago.
12 Eighteen years ago, the entire staff of the
13 Chickasaw Nation consisted of a handful of tribal
14 employees. Today, the Nation has emerged has one
15 of Oklahoma's leading employers with more than
16 10,000 employees.

17 Without exaggeration, it is Class II
18 gaming that has fueled the economic growth of the
19 Nation in 13 Oklahoma counties which surround the
20 Nation Indian lands by providing the means for us
21 not only to develop economically but to deliver a
22 broad range of essential governmental services,

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1 educate our young, care for our elders, and
2 improve health care services for all.
3 The investments we have made in turn
4 have made an immense difference in the lives of
5 our people and communities in which they reside.
6 Before us today is a proposed rule that
7 would fundamentally alter the legal underpinning
8 of Class II gaming and render unlawful Class II
9 gaming as we know it today. We are disappointed

10 that the NIGC has elected to publish this
11 proposal over the virtually unanimous objections
12 of the tribal leadership.

13 We do not expect such a deeply-flawed
14 proposal, given the investment of time, the
15 number of drafts, and the mountain of comments
16 from tribal leaders and industry representatives.

17 We do not offer such criticism lightly. It is
18 the policy of the Nation to endeavor to be
19 constructive in our comments and to work
20 cooperatively with federal agencies in the best
21 spirit of the government-to-government
22 relationship.

2 the rule, we offered what we believed to be a
3 constructive suggestion as well as a possible
4 alternative approach. While we did not
5 necessarily anticipate that all of our
6 suggestions would be embraced, we did anticipate
7 that the final draft would reflect at least some
8 of the elements common to the comments submitted
9 by tribal governments. What we did not
10 anticipate is that the proposed rule would be
11 even more objectionable than the initial draft.

12 We note from the preamble of the NIGC's
13 desire for clarity and certainty in relation to
14 this distinction between Class II and Class III
15 gaming. While we recognize these interests, at
16 stake there is an equally compelling interest in
17 stability and consistency.

18 Under the proposed rule, not a single
19 electronically-aided Class II game in play today
20 anywhere in Indian Country would remain lawful,
21 including those games affirmed by the federal
22 courts and those games previously authorized by

1 the NIGC. Literally millions of dollars have
2 been invested in reliance on the courts and the
3 NIGC and literally millions of dollars in future
4 earnings will be lost if this regulation is
5 adopted.

6 This regulation jeopardizes contractual
7 arrangements, financing decisions, jobs,
8 ancillary businesses, scholarships, police, fire,
9 and other emergency services, health care
10 benefits, grants to schools, charities, and the
11 list goes on, and it deprives tribal governments
12 of the full benefit of the law as enacted by
13 Congress.

14 As an independent agency of the United
15 States, the NIGC possesses the authority to

16 interpret IGRA independently of the views of any
17 other federal department or agency and to do so
18 in a manner that will not deprive tribal
19 governments of the full benefit of the law in a
20 critical economic engine.

21 In the proposed rule, the NIGC has opted
22 for the least favorable, most injurious

1 interpretation of the law from the tribal
2 perspective. In the text of the preamble, the
3 NIGC make clear that it has done so at the urging
4 of another cabinet-level department. That agency
5 had its day in court, actually several, and its
6 legal theories were rebuffed by no less than four
7 federal circuit appeals courts.

8 The NIGC is under no obligation to

9 vindicate another agency's theories about Indian
10 gaming. Neither does another federal agency have
11 the right to impose its views on the NIGC.

12 On the other hand, the NIGC is under an
13 obligation to adhere to the interpretation of the
14 courts, to consult meaningfully with tribal
15 government officials and to apply the law fairly.
16 We urge the NIGC to exercise its authority to
17 change its direction and work collaboratively
18 with tribal leaders to resolve its concerns about
19 the classification of games in a manner that
20 fairly takes into account the interests of tribal
21 governments.

22 We believe that there are many

1 alternatives that have not been adequately
2 explored. We would urge the NIGC to work through
3 these issues and explore alternatives on a
4 government-to-government basis in order to avoid
5 an economic catastrophe in many parts of Indian
6 Country.

7 The Indian Gaming Regulatory Act was
8 enacted as a means to facilitate and strengthen
9 tribal government capacity and economic
10 development. It is unreasonable to construe IGRA
11 as requiring Class II gaming to be substantially
12 less lucrative than Class III gaming as some have
13 continually urged.

14 In fact, the committee report
15 accompanying IGRA at the time of enactment
16 specifically stated that the committee
17 specifically rejects any inference that tribes
18 should restrict Class II games to existing game
19 sizes, level of participation or current
20 technology.

21 The committee intends the tribes be
22 given the opportunity to take advantage of modern

1 methods of conducting Class II games and the
2 language regarding technology is designed to
3 provide maximum flexibility.

4 Nonetheless, the policy choice reflected
5 in the proposed rule is to so restrict the use of
6 technology as to strip electronically-aided
7 games, Class II gaming of its economic viability.

8 It is simply unreasonable to classify an
9 electronically-aided Class II game as Class III
10 gaming based on superficial features.

11 Under IGRA, the game of bingo is a bingo
12 so long as the game meets the statutory elements.
13 Class II bingo does not become a Class III game
14 just because the cabinet does not have two-inch

15 letters stating that the game is a game of bingo
16 nor does a player terminal transform the game of
17 bingo into a facsimile just because there's an
18 entertainment display simulating spinning reels.

19 The amount of the prize is not an
20 element of the game of bingo. A requirement that
21 a game must be prolonged for at least eight or 10
22 seconds in order to qualify as Class II bingo is

1 not an appropriate criteria for classification.
2 In fact, none of these criteria represent
3 appropriate legal elements determinative of the
4 class of a game under IGRA.

5 Also, the NIGC desires by proposed
6 regulation to create an ongoing relationship
7 between the NIGC and gaming laboratories. No

8 statutory authority exists for the NIGC to assert
9 the Indian government authority and become the
10 sole selector of gaming laboratories. In fact,
11 such a position is contrary to court decisions
12 previously taken by the NIGC.

13 Vendor relationships, whether between a
14 laboratory or game software vendor, need to
15 remain between the Indian sovereign who license
16 vendors and the vendor's license.

17 Attempts by the NIGC to grant itself
18 day-to-day license authority for game
19 laboratories has no statutory basis and is
20 contrary to the sovereign authority of the tribal
21 government.

22 Because of time limitations, this oral

1 statement is a summary and we will be providing
2 more detailed written comments to be submitted by
3 September 30th.

4 CHAIRMAN HOGEN: Thank you very much.

5 MR. CAMPBELL: Thank you.

6 CHAIRMAN HOGEN: Tracie Stevens?

7 MS. STEVENS: Thank you, Mr. Chairman,
8 and Commissioner Choney.

9 My name is Tracie Stevens, and I'm the
10 Senior Policy Analyst at the Tulalip Tribes'
11 Governmental Affairs Department.

12 I'm standing in for my chairman, Stanley
13 Jones, who could not attend today's hearing due
14 to an emergency back at home. He does send his
15 apologies and his regards. However, I am
16 prepared to make his statements and comments in
17 his place.

18 We appreciate the opportunity to provide
19 testimony here today on the Commission's
20 classification and technical standards proposed
21 rule. My testimony will highlight our greatest

22 concerns, but for the sake of time, we will

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1 submit our written comment later, by the
2 September 30th deadline, which will include all
3 of our concerns.

4 Before I talk about the proposed rule, I
5 would like to take a moment to tell you a little
6 bit about Tulalip. The Tulalips are the
7 signatories to the Point Elliott Treaty of 1855,
8 and we're located about 35 miles north of
9 Seattle, and we have about 3,800 tribal members.

10 Tulalip opened its bingo hall in 1983
11 which at the time provided a significant source
12 of revenue and jobs for our tribe, although the
13 operation was small. We were the first tribe in

14 the State of Washington to negotiate the first
15 tribal state compact.
16 At that time, we negotiated only for
17 house bank card games and later, through what is
18 referred to as a "friendly" lawsuit, negotiated
19 Class III tribal lottery system, a machine system
20 that's modeled after the state's lottery system
21 where players play against each other for
22 predetermined prizes and they are not slot

37

1 machines.

2 As a part of this lawsuit, a specific
3 and unique compact appendix was negotiated which
4 limits the number of these Class III machines
5 allowed each tribe and their gaming facilities.
6 This limitation is of significant importance to

7 Tulalip, which I will elaborate on later in my
8 testimony.

9 Our first concern with the rule concerns
10 the Commission's consultation process. We
11 believe that the proposed regulations disregard
12 NIGC's duty to adequately consult with tribes.
13 In reviewing the preamble of the Commission's
14 proposed classification and technical standards
15 as published in the Register, the three-year
16 process of consultation is described wherein a
17 tribal representative advisory committee was
18 established with the intent to collaboratively
19 work with the Commission on the proposed
20 regulations.

21 However, later in the Register, the
22 Commission admits to dismissing the advisory

1 committee's revisions or suggestions. We do not
2 find such disregard meets consultation standards.
3 Also, these meetings were not recorded in any
4 manner for public consumption.

5 Further, it stated that the Commission
6 consulted with the Department of Justice over a
7 five-month period in which tribes were not
8 included.

9 At the end of this collaborative
10 consultation between the two agencies, the DOJ
11 attempted to change the classification standards
12 but rescinded after being met with great
13 opposition from tribes.

14 It appears to us that the Commission has
15 had a more meaningful consultation with the DOJ
16 than they did with the tribes, as indicated by
17 the Commission's acquiescing to the concerns of
18 the DOJ by drastically changing the fifth draft
19 without the input of the tribes and incorporating
20 much of the DOJ's previously-failed attempt to

21 reclassify Class II machines.

22 This drastic shift in the fifth draft

39

1 alone negates the three years previous
2 consultation efforts with tribes and cannot be
3 mitigated with the one-month time period for
4 consultations that the Commission required which
5 was both inadequate and unrealistic.

6 Our second concern is with the financial
7 impact of such regulations. There's no evidence
8 that the Commission complied with the
9 requirements of the Unfunded Mandate Reform Act
10 of 1995 to assess the financial impact these
11 proposed regulations may have on tribal
12 governments.

13 The Commission, as a federal agency
14 promulgating a regulation, has a duty to prepare
15 and consider estimates of the budgetary impact of
16 regulations. Although the preamble to the rule
17 does state that the "Commission has determined
18 that this proposed rule does not impose an
19 unfunded mandate on state, local, or tribal
20 governments or on private sectors of more than a
21 100 million per year," the Tulalip tribes have
22 not yet seen the assessment required by UMRA.

1 We know that the proposed rule will
2 adversely affect Tulalip. Combining our economic
3 impact with countless other tribes across the
4 nation would likely exceed the Commission's
5 estimate of a 100 million per year. Therefore,

6 we believe that it is the duty and the obligation
7 of the Commission to provide an assessment of the
8 proposed action as mandated by that Act.

9 Finally, to speak specifically to
10 Tulalip, the proposed rule would have a
11 detrimental effect on Tulalip. It would
12 eliminate the tribe's only avenue of expansion
13 and would require a drastic reduction in the
14 current Class II gaming operation.

15 The changes in the fifth draft were so
16 drastic that all currently-approved Class II
17 machines would become Class III machines. This
18 is of paramount concern to us because Washington
19 State's compacts with tribes utilizes a system
20 whereby each tribe is allocated a certain number
21 of player terminals that can be used by the
22 tribes in a gaming facility or leased to another

1 tribe. At this time, there are no more player
2 terminals available by use by any of the tribes
3 because of these limitations.

4 Today at Tulalip Bingo, the Class II
5 player terminals in operation bring in more
6 revenue to the Tulalip Tribes than do the paper
7 bingo games. As stated previously, none of the
8 Class II games currently on our bingo floor would
9 qualify as Class II machines under the proposed
10 rule.

11 If the proposed rule is promulgated as
12 final, the Tulalip Tribes would have no choice
13 but to remove those machines from the Class II
14 facility which would cut our bingo operation by
15 more than half.

16 The Tulalip Tribes of Washington are
17 limited to two Class III gaming facilities per
18 tribe and we would not be able to use these
19 machines any longer. The survival of the Tulalip

20 bingo operation as its operates today depends on
21 the combined revenue generated from both the
22 Class II machines and bingo. The loss of the

42

1 Class II machines and resulting deterioration of
2 the bingo operation would have a significant and
3 detrimental cultural impact as well.

4 We would lose approximately 40 jobs that
5 are held primarily by Tulalip tribal members, and
6 due to the restrictions on Indian gaming
7 facilities and the machine allocations in the
8 state, there's no option to replace these
9 machines. The loss of these games would limit
10 the tribe's ability to expand further and would
11 in fact diminish the gaming operation.

12 More importantly, the services and
13 programs we provide to our people would diminish
14 as a result of the loss of bingo revenue. This
15 counters the intent of IGRA which is to promote
16 tribal economic development, self-sufficiency,
17 and strong tribal governments.

18 In sum, we respectfully request the
19 Commission to provide meaningful consultation
20 with tribes by holding more meetings in more
21 locations throughout the country, to give as much
22 consideration to the tribes' suggestions and

1 recommendations as was given to the DOJ, by
2 working collaboratively to exchange ideas and to
3 make record of all consultation proceedings, and
4 lastly, we request that an economic assessment be

5 conducted to conform to UMRA to indicate the
6 potential economic impacts tribes would expect if
7 this rule is promulgated.

8 Thank you.

9 CHAIRMAN HOGEN: Thank you. Mr.
10 Lombardo?

11 MR. LOMBARDO: Thank you, Chairman.

12 Good morning. My name is Charlie
13 Lombardo. I'm the Senior Vice President of
14 Gaming for the Seminole Tribe of Florida. In
15 that capacity, I have significant responsibility
16 for the Class II gaming conducted by the tribe at
17 its seven gaming facilities located on tribal
18 lands in the state of Florida. Among these
19 responsibilities is to ensure that the games
20 offered are fun and entertaining for the guests
21 and profitable to the tribe.

22 Before coming to work for the tribe in

1 September 2002, I held various positions with
2 Park Place Entertainment in Las Vegas, including
3 Senior Vice President of Site Operations for
4 Caesar's Palace and Bally's Las Vegas. I opened
5 the Paris Las Vegas also as Senior Vice
6 President, Slot Operations. Before that, I
7 worked for the MGM Grand Las Vegas.

8 During my career, I have helped design
9 many electronic gaming machines, including the
10 Class II electronic games currently used by the
11 Seminole Tribe of Florida.

12 The Seminole Tribe has been a leader in
13 the area of Indian gaming. The tribe was the
14 first tribe to open a commercial bingo hall and
15 has been conducting gaming to provide revenue for
16 tribal programs for over 25 years.

17 Although the tribe has the right to
18 offer slot machines, since slot machines are

19 extremely permitted under the state law, the
20 tribe has been limited to Class II gaming due to
21 the failure of the state and the federal
22 government to follow federal law by refusing the

45

1 compact issues or issue procedures in lieu of a
2 compact.

3 Since the tribe has been forced by the
4 state and the federal government to rely on Class
5 II gaming, the tribe has, of necessity, worked
6 with the gaming industry to maximize the
7 commercial viability of Class II gaming.

8 The tribe has been a leader in helping
9 to promote standards to ensure game integrity and
10 compatibility between games and related back

11 office systems. For these reasons, both the
12 tribe and I were encourage when, in 2003, the
13 NIGC announced plans to develop common technical
14 standards for Class II games.

15 Because of my technical background with
16 electronic games, the tribe nominated me to serve
17 on the advisory committee established by the NIGC
18 to assist with the preparation of these Class II
19 standards.

20 While the NIGC listened to our comments
21 and concerns with each draft of the proposed
22 classification regulations, it became

1 increasingly clear that the NIGC reigned in Class
2 II gaming and restricted it to games that would
3 be very little commercial viability. Thus,

4 decisions about various restrictions included in
5 the drafts appeared to be driven by whether
6 change would help to slow game or otherwise make
7 the game less attractive to the players.

8 I am advised that this is contrary to
9 the plain language of the IGRA, the case law, and
10 even IGRA's own prior decisions. I think that it
11 is highly important to note that not one of the
12 significant comments made by me or other members
13 of the advisory committee was accepted by the
14 NIGC. In fact, we had no role in the actual
15 drafting of the proposed classification
16 regulations.

17 The members of the advisory committee
18 frequently and usually unanimously objected to
19 the language developed by the NIGC. We were told
20 repeatedly by the Commission that its decorum
21 restrictions were necessary to provide a clear
22 line between Class II and Class III gaming.

1 We agree there needs to be a clear line
2 between Class II and Class III. However, we
3 believe that the line was drawn by Congress and
4 that there's no need for a basis for the NIGC to
5 draw a different and more restrictive line.

6 In the case of bingo, there's a simple
7 test. One, the game must meet the three IGRA
8 requirements of bingo and, two, if the underlying
9 game is bingo, then it can be played with
10 electronic aids, as long as the aids do not make
11 the game into a facsimile by permitting a player
12 to play the game with or against the machine
13 rather than with or against other players.

14 Applying this test is very simple.
15 Tribes are free to use technology, including
16 auto-daub, to aid in the play of bingo and other
17 Class II games, as long as the aid does not

18 permit the player to play alone, with, or against
19 the machine.
20 Granted, this gives tribes a great deal
21 of flexibility in game design, but that is what
22 Congress intended. In contrast, the NIGC's

1 proposed regulations would impose numerous
2 additional and arbitrary requirements on what it
3 takes for a game to be bingo and on the type of
4 electronic aids that can be used to play bingo.

5 Based on my many years of experience in
6 the gaming industry, I can tell you that the
7 games that would be permitted under the proposed
8 regulations would be extraordinary expensive to
9 produce and have little, if any, commercial

10 viability.

11 In my opinion, the present major
12 manufacturers of these games would abandon this
13 platform and exit from Class II, leaving only
14 those game manufacturers that operate in gray
15 areas, the same individuals that the NIGC
16 originally intended to eliminate when it started
17 this process.

18 The proposed regulations, by
19 dramatically restricting Class II gaming, would
20 also be very unfair to tribes in states, such as
21 Florida, where the tribes are forced to compete
22 with Class II games against Class III games

1 permitted under state law. By denying Class III
2 gaming to the tribes, the states are able to

3 generate significant tax revenue from non-Indian
4 gaming while largely leaving the tribes out in
5 the cold. It is hard to believe that Congress
6 intended such a situation.

7 For all these reasons, the NIGC's
8 proposed Class II regulations are fundamentally
9 flawed and should be withdrawn. Rather than try
10 to rewrite and limit the scope of Class II gaming
11 permitted by the IGRA, the NIGC should work with
12 tribes to refine and finalize technical standards
13 that will help ensure game integrity and
14 compatibility.

15 Thank you.

16 CHAIRMAN HOGEN: Thank you. Chairwoman
17 Mejia?

18 MS. MEJIA: Good morning. My name's
19 Marjie Mejia. I am the Tribal Chair of Lytton
20 Rancheria of California, known as the Lytton Band
21 of Pomo Indians, and currently, I serve as the
22 CEO for Casino San Pablo located 20 miles from

1 San Francisco.

2 Our facility opened a year ago August
3 1st, and it has had a major impact with what
4 we've been able to do with the revenue generated
5 from our business. We've been able to provide
6 education benefits to our members. We've been
7 able to implement programs, such as health care
8 and in-home assistance, for our elders, and these
9 are really important to my people because they've
10 gone without these services.

11 We were a terminated tribe, landless for
12 over 40 years, and now my members are starting to
13 see something positive in the future, and these
14 proposed regulations are a great concern to my
15 people because it could strip them away from
16 that.

17 In addition to what the benefits of
18 Casino San Pablo do for my people, it also
19 supports the communities surrounding the casino.
20 The casino provides 90 percent of the San Pablo
21 City budget, General Fund budget, and that has
22 allowed them to implement programs, like reduce

51

1 the utility tax.

2 Casino San Pablo employs over 500
3 people. City of San Pablo is a very impoverished
4 community in the East Bay and these jobs are of
5 the utmost importance to them. We also support
6 the San Pablo Community Foundation and the
7 Brookside Community Health Center which funds
8 health care for the unfunded members of San Pablo

9 Community.

10 So, these are very significant efforts
11 being done with the revenue generated from this
12 casino, and these proposed regulations will not
13 only stop the benefits to the community but it's
14 really termination for my people again, and I am
15 going to submit written testimony before your
16 September 30th deadline.

17 However, I came here personally to look
18 you in the eye and tell you that this is serious.
19 This is people's lives that are at stake here,
20 and I strongly urge you to consider these
21 regulations and what you're going to do to the
22 people in my community and the community in the

2 So, I thank you.

3 CHAIRMAN HOGEN: Thank you. Chairwoman

4 Mejia, let me just ask you a couple of questions

5 here, lest I forget.

6 If memory serves me, there was a lot of

7 discussion before your facility opened with

8 respect to the machines that were going to be

9 placed in the place. If I understand it

10 correctly, those are multiple-touch games as

11 opposed to games you just push the button once

12 and the game is over.

13 MS. MEJIA: Yes, sir, you're correct.

14 We tried twice. We negotiated a compact in good

15 faith with the governor of California. We

16 believed that it was in good faith, and the

17 legislature refused to ratify that, leaving us to

18 exercise the option in IGRA to do Class II

19 gaming, but my people wanted to do things right

20 and they searched and researched, our technical

21 team. We worked with the manufacturer and we

22 talked with all of you, and our machines are

1 three touch. Our machines do not have automatic-
2 daub and with everything that I stand before you
3 with today, I believe those are truly Class II
4 machines.

5 CHAIRMAN HOGEN: Okay. And if you can,
6 can you tell us how they would have to be played
7 differently from how they're being played now if
8 these rules would go into effect?

9 MS. MEJIA: If they're played, from what
10 I understand, and I'm not a technical person, --

11 CHAIRMAN HOGEN: Sure.

12 MS. MEJIA: -- but I am told that this
13 will slow the game down and basic math tells you
14 that you only have so many hours in the day and
15 if it takes twice as long to play the game or a

16 third longer, you're cutting the revenue by that
17 much.

18 CHAIRMAN HOGEN: Okay. We will look
19 forward to your written comments, and if you're
20 able to crunch some numbers and project the
21 difference, based on what the proposal is and
22 what you're doing now, that would be useful to

54

1 us.

2 MS. MEJIA: Well, part of my team's out
3 here, so they're already working on it. Right,
4 guys?

5 CHAIRMAN HOGEN: Okay. Thank you. Mr.
6 Halbritter?

7 MR. HALBRITTER: (Indian Language.) I

8 bring you greetings of peace from the Oneida

9 people.

10 There were screams one night that awoke
11 our people in the middle of a summer night in
12 June of 1975 on Oneida Nation Territory that has
13 been our homeland since time immemorial. Just
14 across the road from my own mobile home, a brutal
15 fire raged totally engulfing another mobile home
16 where two Indian people were trapped inside and
17 were being consumed by the flames.

18 Frantic, desperate calls were made to
19 the City of Oneida Fire Department, the city, by
20 the way, that bears the name of our people, but
21 they refused to respond and they never responded
22 to our cries for help. My aunt and uncle, Sam

1 and Janice Winder, burned to death in that fire.

2 No words imaginable can describe how we
3 felt in this country as remnant Indian nation, a
4 small 32-acre tract of land, all that was left of
5 our original six million-acre territory.

6 At that point in our existence, we lived
7 on dirt roads, failed septic and water systems
8 and dilapidated mobile homes. Rather than
9 looking for the government for handouts, after
10 200 years of failed government policies, we
11 decided to try something different. We decided
12 to do something to raise money for our own fire
13 protection, something that many non-Indian
14 communities can take for granted.

15 We did what many communities have done
16 through the years in New York State. We began to
17 conduct bingo games to raise money to protect our
18 homes and families. Our high-stakes bingo game
19 ultimately led to a series of legal disputes with
20 the State of New York about conducting a bingo
21 game without a state license. We did not have

1 games ended for a time.

2 Then the Seminole Tribe of Florida heard
3 about our high-stakes bingo games and this
4 resulted in the Foundation for Indian Gaming,
5 starting with *Seminole v. Butterworth*, 1979,
6 *California Cabazon v. Cabazon Band of Mission*
7 *Indians*, 1987, and culminating in the passing of
8 the Indian Gaming Regulatory Act of 1988.

9 We've come to Washington today to
10 testify because once again the federal government
11 seeks to change the nature of its relationship
12 with sovereign Indian nations and tribes
13 unilaterally and in a manner which adversely
14 affects our successful Indian economic

15 opportunity.

16 We could have opened any number of
17 federal hearings over the years with that
18 sentence. Today is just the latest instance
19 relating to the proposed Class II gaming
20 regulations. America has a long history of
21 striking deals with Indian governments and then
22 changing the deal as it pleases. Oftentimes the

1 relationship's changed simply because the United
2 States no longer likes the deal it entered into
3 with an Indian nation or tribe, so the government
4 conveniently changes the relationship to one that
5 it wants, until it no longer likes its new
6 relationship and again makes its changes.

7 The U.S. has the power to do that, has
8 the might to do what it wants with Indian people,
9 but unfortunately the American Indian experience
10 has never lived up to Justice Black's famously
11 quoted standard that great nations like great men
12 should keep their word.

13 Moreover, the way a nation treats its
14 friends says a lot about the nation. In
15 particular, the Oneida people have witnessed
16 firsthand throughout America's history the record
17 of the U.S. entrance into treaties, making
18 promises and defining relationships only to have
19 it change without much regard for the effect on
20 Indian people.

21 Even after our nation fought on the same
22 side as the Colonists, the new United States

1 entered into a series of treaties, the most
2 significant being the Treaty of 1794,
3 Canandaigua, where each side agreed to defend and
4 protect each other's use of their lands. That
5 treaty was violated. Unfortunately, history
6 shows that America did not live up to that end of
7 the deal either. Oneida people were cheated, our
8 land was stolen, our culture was devastated. Our
9 people became poor, homeless, hungry, and
10 uneducated in our own land.

11 America stood by and witnessed all of
12 these injustices, despite the special
13 relationship it was supposed to have by treaty
14 agreement with the Oneida Nation. It seems we're
15 getting a lot of attend these days with the
16 gaming opportunity.

17 Even in the fact of these hardships, the
18 Oneida people never wanted government handouts or
19 dependence upon others, then or now. All we want
20 or all we ever have wanted is for the United

21 States to live up to its word, allow us a chance

22 to rebuild our lives, to live in peace on our

59

1 homelands and retain our culture and our home,

2 without federal or state interference.

3 In many ways, the Indian Gaming

4 Regulatory Act has been a successful and rare

5 example of America's effort to help us do just

6 that. IGRA's allowed new opportunities to

7 improve the federal tribal relationship that

8 allows us to rebuild our communities, our

9 families and our lives with minimal federal or

10 state interference, without handouts.

11 The Oneida people and others recognize

12 this opportunity. We are succeeding at building

13 our lives. We use gaming revenues to provide

14 health insurance for our people, to acquire lands
15 and to build our cultural legacy. It's a
16 workable deal, and we're trying to rebuild our
17 nation under that.

18 We've created a gaming commission. All
19 our employees are drug-tested and background-
20 checked. One of the most secure employment
21 opportunities in the state of New York. We've
22 used for nearly three decades, we've used Class

60

1 II gaming to rebuild our culture in a responsible
2 fashion, and we've used it to help our people,
3 and even in the face of these hardships, we've
4 tried to help our people have a better life
5 today, and we hope that, you know, in particular,

6 Congress intended for Indian nations to have
7 maximum flexibility to utilize technology in
8 playing non-banking games.

9 If the intent of Congress is maximum
10 flexibility, then the regulations must reflect
11 maximum flexibility. For those Indian nations
12 not even able to obtain a compact after Seminole,
13 the restrictive nature of Class II regulations is
14 just an example of a broken promise of
15 opportunity to Native America.

16 Regulation of Class II gaming being more
17 restrictive is a retreat towards a day when
18 America changes the rules simply because the
19 original deal no longer served its interest.
20 Regulations are designed or may be interpreted to
21 assist Indian nations to be either more self-
22 determining and independent or self-sufficient or

1 more dependent upon handouts.

2 It's been no secret that from the
3 outset, Indian gaming has been opposed by
4 mainstream gaming as mainstream gaming has used
5 its wealth and influence to attempt to erode and
6 restrict the gaming opportunity to Indian people.

7 We're one of America's first allies.
8 Our relationship is fundamentally important. We
9 wish to enter into meaningful government-to-
10 government relationships with the federal
11 government that would help achieve retaining the
12 opportunities for Indian people.

13 The proposed amendments would erode and
14 break the balance of the relationship with a one-
15 sided decision. America can and should do better
16 than that. In behalf of the Oneida people, I
17 respectfully urge the Commission not to adopt the
18 proposed amendments and as always remain willing
19 to sit with you to negotiate rules that work for

20 all parties.

21 Would it not be better for everyone's

22 sake to work together to craft a solution that we

62

1 can all live with than to unilaterally impose

2 rules that detract from the promise of

3 opportunity that IGRA provided, both recognized

4 and provided?

5 Again on behalf of the Oneida people, I

6 thank you for your time.

7 CHAIRMAN HOGEN: Thank you. At this

8 time, we would open the floor to questions of the

9 Commission or panelists regarding the testimony

10 we've heard to date, and we're a little behind

11 schedule. We'll try and do this long enough to

12 entertain the questions but try to wrap it up in

13 10 or 15 minutes, if it takes that long.

14 Are there questions or comments from the
15 floor at this point in time?

16 MR. COLEMAN: (Indian Language.) I
17 greet you and I thank you in the language taught
18 to me by my grandparents. My family name is
19 Yemshikal. My Christian name is Bill Coleman.
20 I'm here as a councilman for the Nooksack Indian
21 Tribe from Washington State.

22 I'm here to speak for our kids. I'm

1 here to represent our elders. I'm here to ask
2 that we not put a chokehold on regulations. As
3 councilmen, we took and decided to generate
4 another economic engine for our tribe.

5 The Nooksack Indian Tribe in Washington
6 State seven years ago was only 800 members.
7 Today, we're just coming close to 1,900 members.
8 Our economic engines are helping us with health
9 care, services to our elders, services to our
10 children.

11 We want to make sure that the decision
12 that the Council makes on economic engines by
13 rules and regulations that we received in the
14 past are correct and will help us because we feel
15 that Class II is going to make another option for
16 us to better the lifestyle of our tribal members,
17 to better the lifestyle of our community.

18 So, starting another Class II facility
19 is one where we hope to again increase support to
20 our medical facilities, to help support and to
21 keep the momentum of our children in their
22 educational pursuits.

1 The Nooksack Tribe, in the last five
2 years, every senior in high school that has
3 started their senior year has graduated because
4 we encouraged them to do that, and we also have
5 been able to give them support.

6 So again, I thank the panel for their
7 comments. Very well spoken. I ask the
8 Commission don't put a chokehold on this economic
9 engine that we have. Be here to work for us, not
10 against us.

11 So, thank you.

12 CHAIRMAN HOGEN: Thank you.

13 MR. YANITY: Good morning, Chairman
14 Hogen. My name's Shawn Yanity, Chairman for
15 Stillaguamish Tribe of Indians in Washington
16 State.

17 We flew about 2,300 miles here for two
18 minutes of testimony. Commissioner Choney stated

19 that he did not want to be here till 12:30
20 tonight. We wanted to go on the record stating
21 that Stillaguamish Tribe would gratefully stay
22 until all can testify on this important issue to

65

1 the Commission and how many folks need to tell
2 the Commission that these proposed rules are
3 foolhardy and have a truly negative impact to our
4 tribes and economics.

5 Our tribe is a small tribe. We only
6 have a 192 members, and around 1995, we only had
7 a 135 acres of land, 32 of those acres were pre
8 '88. We had to move houses in order to put in a
9 facility. We had no economic capabilities
10 without land, without any kind of backing
11 financially. We had a lot of great ideas, but no

12 bank or anybody wanted to come in and back any
13 ideas that we had because we didn't have land, we
14 didn't have no way to back up if that business
15 failed.

16 So, we purchased 80 acres of land to
17 replace the housing that we tore up, and our
18 casino right now has helped pave the way for
19 purchase of over another 500 acres of land as
20 well as start a methadone clinic, dentist clinic,
21 behavior health clinic. If it wasn't for our
22 facility, we wouldn't have those things.

1 So, we urge you to reconsider because
2 small tribes like our tribe and myself as a
3 leader looking at what that facility has done for

4 our people has really got us up to speed because
5 we were drowning. We weren't going anywhere. We
6 didn't have the opportunities, no land. So, for
7 us, this is very important.

8 Thank you.

9 CHAIRMAN HOGEN: Thank you, Chairman.

10 If there are no other questions at this
11 time, we will thank -- I'm sorry. There will be
12 opportunity to comment from the public following
13 other panels. So, if we bring this to a
14 conclusion and you haven't had an opportunity,
15 we'll try to get to it later.

16 Yes, sir?

17 MR. REID: Good morning. Thank you for
18 being here for us and letting us here to do some
19 public comments on the issue of Class II gaming.

20 My name is Morris Reid. I'm the Vice
21 Chair of Picayune Rancheria. I'm from Corskill,
22 California. I live in Fresno, and on this

1 occasion here, I thought it was very important
2 that we be represented here today.

3 I'd just like to make a comment on the
4 issue of this Class II gaming and the amendments.

5 I have down here that clearly the good
6 intentions of past administrations is now being
7 reversed. Termination of economic prosperity for
8 the tribes. This is a list of what our tribe
9 feels is happening in this reversal. Termination
10 of economic prosperity for tribes, deteriorating
11 sovereignty and the Department of Justice attempt
12 to move monies, power and control to state and
13 local governments, three Class II compacts will
14 be used against tribes, not for the benefit of
15 the tribes for economic self-sufficiency and
16 stronger governments but for outrageous prices,
17 through licensing prices taken out of the air to

18 do this just to pull monies and control away from
19 the tribes, and this also closes the door on
20 negotiations in good faith, and by that I mean
21 that, say if California, we do go before the
22 governor and legislation to have compacts passed

68

1 and it seems that when you do this, the
2 outrageous prices being given out that you have
3 to take is something that's like strongarm
4 tactics and without Class II gaming to leverage
5 yourself in a way that would make them come to
6 the table in good faith, it seems like that will
7 disappear.

8 It seems that we're returning to the
9 1950s and '60s in enacting laws that would wipe
10 out court decisions of regulations and

11 congressional legislation history, undermining
12 legal existence of Indian tribes and accede
13 jurisdictional and tribal sovereignty to the
14 state.

15 Clearly, the good intentions of the past
16 administration are now being reversed. We feel
17 that termination of prosperity for the tribes,
18 dictating sovereignty and Class II compacts being
19 used against tribes, not for the benefit of
20 tribes. I may have read that before, but we feel
21 that these are really taking away that,
22 especially in California where monies for the

1 states are really tight. They've gone into
2 deficit. These local governments are also in

3 deficits and it seems like the good intentions of
4 the administration and yourselves will be
5 reflected through this amendment that would give
6 more stronger leverage to counties and states,
7 that it would deteriorate, say, tribe sovereignty
8 in coming to the table in good faith and try to
9 build up the tribes sufficient for self-
10 government and also for stronger government.

11 We've run into this through the 1A of
12 our compacts in California. We took 1,800
13 machines. We're now trying to get 200, but
14 that's not now available. It seems like they
15 want to have you to come to the table and
16 amendments of that compact and with that comes
17 high prices and different prices on the amounts
18 of games and different regulations that you have
19 to now change in order to get these and in that
20 way, it seems like it's just a deterioration of
21 the sovereignty of the tribe in coming to the
22 state and local governments for any type of good

1 faith negotiations.

2 With that, I'll conclude. Thank you

3 very much.

4 CHAIRMAN HOGEN: Thank you. One more

5 comment before we break, please.

6 MR. PARKER: Gentlemen, I'm Kevin

7 Parker. I'm the Director of Gaming for the

8 Stillaguamish Tribe. I'm also a registered

9 member of the Chippewa Cree.

10 There's so many parts of this proposal

11 that we find egregious, but with only two

12 minutes, I thought I would just lock into one of

13 them.

14 Between legislation regarding trust

15 reform, off-reservation gaming and legislation

16 currently being proposed with the changes

17 regarding IGRA, that would be 2070(a), I don't
18 think there should be any question that folks in
19 Indian Country feel like they're under attack.

20 With regard to that, this comes up. All
21 right. This is a tough, tough egg for these
22 tribes to deal with. Is there any question on

71

1 the Commission's part that eight seconds between
2 spins, games, will completely destroy the
3 technological aids to bingo? Because it will, at
4 least from my point of view.

5 We have 90 machines within our facility
6 that are Class II. Ms. Stevenson from the
7 Tulalip mentioned earlier that we had a compact
8 in the State of Washington. We do not have true
9 Class III games on our Class III side.

10 On the Class II side, we followed all of
11 your rules. We got our letters. We made sure
12 the vendors that we used had your letters. We
13 followed every single rule and now all those
14 rules are changing. The economic impact to this
15 is going to be devastating in Indian Country,
16 devastating, and we wanted to go on the record as
17 stating just that.

18 Thank you.

19 CHAIRMAN HOGEN: Thank you. With that,
20 we will conclude this first panel.

21 I want to thank the panelists. I know
22 how sincere you were in the presentations that

1 you made. Please appreciate that we receive it

2 with that same sincerity and we will consider
3 very seriously what you have said.

4 We may have some questions we'd like to
5 submit to you following this proceeding and if
6 you would please respond to those, we would be
7 much appreciative.

8 So, at this time, we will thank this
9 panel and we'll reconvene here with the other
10 panel in five minutes, about 11:15, and be ready
11 to proceed. So, we'll break for just a couple of
12 minutes.

13 (Recess.)

14 CHAIRMAN HOGEN: I think this is the
15 first time I've ever used a gavel. It's kind of
16 fun.

17 Okay. We are moving now to Panel 2.
18 Panel 2, I guess, is kind of a mixed bag in that
19 there isn't necessarily any common ground between
20 the two groups that we have represented here, but
21 because of the time constraints and so forth,
22 this was a good place to put both groups.

1 We have State Governments represented as
2 well as the Testing Labs that might participate
3 in the process as included in our proposal. We
4 have from the Conference of Western Attorneys
5 General Tom Gede, the Executive Director of that
6 conference. We have from the Washington State
7 Gaming Commission Sharon Tolton-Reese, the Deputy
8 Director there, and then on the Lab side, we have
9 Nick Farley of Nick Farley and Associates, and
10 Drew Pawlak of BMM Testlabs, and we'll begin with
11 Tom Gede of the Conference of Western Attorneys
12 General.

13 Panel 2 - State Governments and testing Labs

14 MR. GEDE: Good morning, Mr. Chairman
15 and Commissioner Choney. My name is Tom Gede,

16 and I'm the Executive Director of the Conference
17 of Western AGs or CWAG. CWAG is an association
18 of Attorneys General of 18 Western states and
19 Pacific Island territories.

20 I'm pleased here to provide some limited
21 views on the proposed rules for the definition of
22 electronic or electromechanical facsimile and

1 classification standards for Class II gaming
2 activities played with computer, electronic or
3 other technologic aids.

4 The Western Attorneys General will be
5 filing comments by next week expressing their
6 views on the proposed rules and my comments today
7 reflect some preliminary perceptions before the
8 filing of the comments next week.

9 The efforts of the National Indian
10 Gaming Commission to adjust this definition and
11 to provide the classification standards are, in
12 our view, particularly commendable. You may not
13 be wanting the support but we'll provide you with
14 the support. We think that some modifications in
15 the proposals might be appropriate; otherwise,
16 the Commission, I think, should be supported in
17 its effort to make these important regulatory
18 changes.

19 Preliminarily, let me just note that the
20 issues before the Commission are of great
21 significance to the states. The ability to
22 accurately distinguish between technologic aids

1 and electronic or electromechanical facsimiles is
2 important to the states precisely because the
3 latter devices, along with slot machines of any
4 kind, are by definition Class III gaming
5 activities requiring a tribal state compact for
6 their lawful use on Indian lands.

7 Paramount here is the intent of Congress
8 and it seems to me that Congress didn't intend
9 Class II gaming to be a hammer to push states
10 that haven't resolved their compacting over Class
11 III gaming. Congress intended Class II gaming,
12 quite literally, to be a grandfathering of
13 certain games, including with the use of those
14 aids.

15 If Congress wanted bingo to be played as
16 an electronic facsimile or as a slot machine of
17 any kind, it would have just put it in Class III
18 or it would have provided an exception for them
19 in Class II and made that explicit. Instead, it
20 provided you with this difficult task you now
21 face of making a clear distinction between
22 technologic aids and electronic or

1 electromechanical facsimiles.

2 The areas I'll cover in this testimony
3 provide the following suggestions for
4 modifications to the proposed rules. First, the
5 proposed definition of electronic or
6 electromechanical facsimile is an improvement
7 over the 2002 definition.

8 As you know, the states opposed the 2002
9 rewrite of the definitional regs and the
10 decoupling of the facsimile from the Johnson Act,
11 but given the 2002 definition, these
12 improvements, particularly in the addition of the
13 word "fundamental" in describing the
14 characteristics of the game incorporated into

15 electronic or electromechanical facsimile,
16 constitutes an improvement in our view.
17 However, the word "all," A-L-L, should
18 be deleted in the proposed definition in
19 Subparagraph 5028(b)(1) in describing those
20 fundamental characteristics as it is internally
21 inconsistent with Paragraph (a)(1) and it opens
22 it up to an argument that incorporating anything

1 less than all fundamental characteristics makes
2 the game a technologic aid and not a facsimile.
3 Second. In the same proposed
4 definition, in Subparagraph (b)(2), the language
5 "rather than broadening participation among
6 competing players" should be deleted, so that the
7 description of when bingo, lotto and other games

8 similar to bingo are facsimiles should end where
9 it states "an element of the game's format allows
10 players to play with or against a machine."

11 Preferably, it would read "the element
12 of the game's format allows players to play with
13 or against a machine that applies an element of
14 chance to win or lose the game," but I address
15 that further in the written testimony.

16 Third. The Class II classification
17 regulations, where it provides for a process for
18 approval, introduction and verification of
19 technologic aids, it should also provide a
20 notification procedure to the states or the state
21 where the gaming is proposed to occur and a
22 process whereby a state is allowed the

1 opportunity to appeal a finding of the Commission
2 that a particular device is a technologic aid.

3 Finally, with respect to the remaining
4 classification proposed regulation, we generally
5 support the many descriptions that have been put
6 in these proposals. We support the restriction
7 on auto-daubing. We support the tangible medium
8 for pull tabs. We are a little confused about
9 some of the prize structures, so that, for
10 example, in ante-up game, it doesn't appear to us
11 to be a classic form of bingo, and we urge that
12 the Commission thoroughly and carefully review
13 the prize structure in such a way that a game
14 isn't being converted into a lottery, a lottery
15 that would otherwise be Class III, and I'd be
16 pleased to answer other questions.

17 CHAIRMAN HOGEN: Thank you, Mr. Gede.
18 Ms. Tolton-Reese?

19 MS. TOLTON-REESE: Thank you. Good
20 morning. If it's possible to be more unpopular
21 than you, sir, I suppose I'm potentially on the

22 hook here being from a state agency and a

79

1 regulator no less, but here we go.

2 Chairman Hogen, Associate Commissioner

3 Choney, Commission staff, and honored tribal and

4 state representatives, ladies and gentlemen,

5 thank you for the opportunity to testify on

6 behalf of the State of Washington regarding

7 proposed rules for Class II electronic devices.

8 My name is Sharon Reese, and I'm a

9 recent new hire with the Washington State

10 Gambling Commission as the Deputy Director.

11 However, I am returning after 10 years working in

12 another state agency.

13 The Washington State Gambling Commission

14 has been the negotiator on behalf of the governor
15 for Class III compacts with tribal governments in
16 the State of Washington for the past 15 years.
17 Twenty-nine unique federally-recognized tribes
18 are within Washington boundaries and there are 27
19 compacts with 24 operations currently open for
20 business.

21 Recent counts indicate that we have
22 about 16,281 machines in play in Class III and in

80

1 Class II, we have about 1,093.

2 Our interest in being here today is to
3 provide a state perspective with regard to the
4 rules for Class II and Class III machine gaming
5 and our thoughts regarding the challenges facing
6 us all in the coming months.

7 We are confident that it was not the
8 intent of the drafters of IGRA or the current
9 wish of the NIGC in the promulgation of rules to
10 allow misrepresentation of games or to submit
11 language distortions that effectively blur the
12 distinctions between Class II and III machines.
13 To do so precludes effective tribal, state and
14 federal regulation and subsequently undermines
15 public confidence which can do damage to the
16 business of gambling.

17 The Commission must continue to show
18 that it is willing to enforce those provisions
19 provided by IGRA with rules that enforce a bright
20 line standard for both regulatory staff and
21 tribal business leaders between the Class II and
22 III devices. Those machines not meeting the

1 specific requirements under IGRA's definition and
2 the Commissioners' clarifying rules should be
3 required to be removed or request to be
4 negotiated under the terms of the Class III
5 compact.

6 IGRA provided clear recognition of both
7 the tribes' and the states' rights to negotiate
8 these high-risk and more profitable types of
9 activities.

10 No one disputes that the income from
11 tribal gaming has provided some phenomenal
12 programs and improvements in Indian Country. In
13 Washington, there's tremendous pride in the
14 employment, educational, health, social programs
15 and much more that tribal governments have
16 prioritized with the funds from gaming
17 enterprises.

18 Local communities and the surrounding
19 areas have also flourished and benefitted from
20 the additional employment and the associated

21 money circle of spending.

22 The NIGC rules separating and

82

1 identifying Class II from Class III machines are

2 something that the states have a very strong

3 interest in. It has been a concern in our state.

4 Even though we all knew that these rules were

5 coming, it appears that purchases of gray area

6 machines continued, even when the draft

7 regulations were already being prepared to be

8 posted.

9 Some enterprises may have been premature

10 and now they must potentially re-evaluate their

11 economic plans, but there is still a very

12 positive future for tribal gaming with

13 appropriate NIGC rules, oversight and the tribal
14 gaming agency regulation in Class II.
15 Over time, adjustments will continue to
16 be made to accommodate changes in the law,
17 technology, the industry, and our varied
18 approaches to regulation, but for now, we are at
19 this point in time, with this set of
20 circumstances, many of us doing the best we can
21 in our own environment to maintain integrity and
22 confidence.

1 The Washington State Gambling Commission
2 has been a nationally-respected gambling
3 regulatory agency since 1974 and worked closely
4 with colleagues at the NIGC since its early
5 development and has observed its growth over the

6 many years since.

7 A regulator's role, however difficult,
8 is to provide simple clarity to their
9 administrative regulations in support of their
10 authorizing law.

11 To summarize, we believe that strong
12 regulation and control, accompanied by fairness
13 and consistency in the implementation of rules
14 and regulations, is critical to the success of
15 gambling regulatory agencies.

16 These rules make some progress but do
17 not fully implement and support IGRA's guiding
18 principles in strictly defining the classes of
19 gaming on Indian lands. They may not have gone
20 far enough and they lack the simplicity for a
21 user. We are concerned that the NIGC may find
22 themselves spending a great deal of time

1 interpreting their rules as a result.

2 The Commission may have significant
3 difficulty fully enforcing these provisions as
4 proposed and needs appropriate resourcing,
5 staffing and budget support to be effective and
6 engender the confidence in this complex
7 environment.

8 In Washington State, the tribal gaming
9 agencies work diligently to maintain an
10 independent regulatory oversight of gambling
11 activities. Our government-to-government
12 relationships continue to improve over the years
13 of working together and sharing common goals in
14 Class III environments through our tribal state
15 compacts.

16 Without agencies to make the tough and
17 sometimes unpopular decisions, there is much more
18 to risk to the industry as a whole with those who
19 take advantage of unclear regulation, lack of

20 adequate or knowledgeable enforcement or outright
21 illegal activities. Working together, the
22 business enterprise and the regulator may not

85

1 always see eye to eye but there are some basic
2 values I'm happy to say most of us aren't
3 compromising on.
4 On behalf of our commissioners at the
5 Washington State Gambling Commission, Director
6 Day and our staff, thank you for the opportunity
7 to be here. As regulators, whether you are
8 tribal, state or federal, we can all appreciate
9 that there are inherent difficulties in
10 maintaining an independence and a balance between
11 public, private and government interests in the

12 area of gambling.

13 Thank you.

14 CHAIRMAN HOGEN: Thank you. And now for

15 something completely different, we will turn to

16 those folks that do testing for a living.

17 Nick Farley?

18 MR. FARLEY: Thank you. Good morning.

19 I'm Nick Farley, President and Founder of Nick

20 Farley and Associates, based in Ohio. We are a

21 regulatory compliance testing and consulting

22 company, serving the gaming and amusement

1 industries.

2 My company and myself personally have

3 been working closely with the NIGC for over eight

4 years. I have been involved in the test and

5 evaluation of electronic gaming devices and
6 systems since 1987, when I started my career as a
7 regulator with the New Jersey Division of Gaming
8 Enforcement in Atlantic City.

9 I'm honored to have been invited to
10 speak on this panel before the National Indian
11 Gaming Commission. Our company has prepared a
12 few reports for the NIGC regarding Class II bingo
13 systems. So, the classification standards are
14 something near and dear to our hearts.

15 I would like to start by stating simply
16 that as an independent testing laboratory, we are
17 able and willing to test products for compliance
18 with any classification or technical standard
19 adopted by the NIGC.

20 The draft of these standards that is
21 under consideration is plausible and testable.
22 However, my experience in compliance testing sees

1 some issues in the proposed standards that will
2 most likely cause debate. In fact, some of the
3 items included in these proposed standards
4 contradict some of the current NIGC advisory
5 opinions on Class II bingo systems.

6 With that said, with regard to bingo,
7 Sections 546.4, 546.5 and 546.6 of the proposed
8 classification standards establish the following
9 requirements that I believe would cause some
10 consternation from the tribes and the gaming
11 industry.

12 These requirements include the
13 following: that the game of bingo include the
14 electronic card but excluding any alternative
15 displays shall fill at least half of the total
16 space available for display; that a message on
17 the game terminal read this is a game of bingo or
18 this is a game similar to bingo in two-inch

19 letters or larger; that the value of a prize be
20 no less than 20 percent of the amount wagered by
21 the player on each card in at least one cent;
22 that the player has the option to not view the

88

1 alternative display and play using only the
2 electronic card display; that a player be
3 permitted to catch up only when buying for the
4 game-ending pattern and be prohibited from
5 catching up for any other prize; that the maximum
6 amount of numbers or characters to be revealed
7 during the first release is one less than the
8 number required for a game-winning pattern,
9 commonly referred to as the N minus 1
10 requirement; that the quantity of numbers in the

11 second or subsequent release not extend beyond
12 the quantity of numbers necessary to form the
13 first eligible game-ending pattern on a card in
14 play in the game.

15 Most of the items that I've just listed
16 appear to be in contrast with the operation of
17 systems operating in the field with a favorable
18 NIGC advisory opinion.

19 I can envision manufacturers and tribes
20 voicing concern that many products that are
21 currently and legally in use will no longer
22 comply with some of the sections of these

1 classification standards.

2 With regard to pull tabs, Section
3 546.7(c) states that the technologic aid may also

4 read and display the contents of the pull tab as
5 it is distributed to the player. The results of
6 the pull tab may be shown on a video screen. The
7 unfortunate side effect of this video pull tab
8 requirement is that it's my understanding that
9 this method is patented. Thus, this requirement
10 limits competition and perpetuates a monopoly.

11 To quickly wrap up my presentation, I
12 realize that adopting classification and
13 technical standards for Class II games and
14 systems is a daunting task. There is no one size
15 fits all solution. There will be criticism of
16 any standard that is adopted because, quite
17 frankly, there's no solution that will please
18 everyone.

19 I realize that technology has blurred
20 the lines between Class II and Class III games.
21 I empathize with law enforcement agencies tasked
22 with deciding what is legal and illegal. Ten

1 years ago, it was safe to assume that if reels
2 were present, it was a slot machine. Now, Class
3 II gaming systems play bingo and reveal spinning
4 reels as an alternative entertaining display
5 which is based entirely on the bingo outcome.
6 This is a law enforcement nightmare, to be able
7 to decipher if the spinning reels are derived
8 from a bingo game or if the spinning reels are
9 the game in its entirety.

10 It is my belief that IGRA did not intend
11 to limit technology in the play of bingo. The
12 systems currently in play and soon to be released
13 to the public are an ingenious way to present
14 bingo to adults that are enticed by the thrill of
15 spinning reels. Reports that I have received
16 indicate that these games are a viable and
17 lucrative means for tribes to derive significant

18 sums of revenue if they do not have a Class III
19 compact or have a limited Class III compact.
20 Please do not take my comments as a
21 criticism of the proposed classification
22 standards. As I stated in the beginning of my

91

1 presentation, our laboratory is willing and able
2 to test to these standards if they are adopted.

3 Based upon my experience in gaming,
4 including Class II gaming, I consider the
5 sections of the classification standards that I
6 discussed as areas of concern for tribes and
7 manufacturers and I just want to put these
8 matters on the table for discussion.

9 I thank you for this wonderful

10 opportunity to speak to you today, and I welcome
11 you to contact my office to discuss these matters
12 at greater length.

13 CHAIRMAN HOGEN: Thank you. Mr. Pawlak?

14 MR. PAWLAK: Good morning, Mr. Hogen,
15 Chairman Hogen and Commissioner Choney.

16 Thank you for inviting BMM Testlabs to
17 participate in the public hearing on the proposed
18 Class II definition of classification standards.

19 The BMM Testlabs is an independent test
20 lab for the global gaming industry that has been
21 in operation since 1982. BMM started in the
22 strictest regulatory market in the world,

1 Australia, and has since expanded to provide
2 coverage for regulators and the industry in every

3 market worldwide. BMM's corporate headquarters
4 are now based in Las Vegas, Nevada.

5 In April 2004, BMM was contracted by the
6 National Indian Gaming Commission as the
7 technical consultant to assist in drafting
8 technical standards for Class II gaming as
9 described by the Indian Gaming Regulatory Act.

10 In this context, it is very important to
11 draw a careful distinction between policy
12 requirements and business rules as determined by
13 government regulatory authorities and technical
14 compliance standards designed to uphold those
15 regulatory requirements.

16 In our role as an independent test lab,
17 it has always been BMM's position that
18 policymakers and appropriate stakeholders of the
19 industry should work together to develop the
20 policy, rules and requirements for the industry.
21 These regulations or rules are or in our view
22 should be generally developed from a public

1 policy and/or legislative point of view. This is
2 a legal policy and process.

3 We are technologists. We do not believe
4 it is our role to advocate a policy position in
5 this context. Once the policy and business rules
6 are clearly defined, then at that point,
7 technical standards designed to ensure compliance
8 with those objectives and requirements must be
9 developed. These standards should explain and
10 govern how specific products and technologies
11 must perform in order to be compliant.

12 If the regulatory framework and
13 requirements are clearly defined, technical
14 standards should be reasonably easy to develop
15 within that framework.

16 Generally, the technical standards have

17 been well accepted by the various stakeholders.
18 However, there are certain portions of the
19 recently-published version of the technical
20 standards which have caused concern among
21 segments of the stakeholder community. These
22 questions or concerns do not arise out of the

1 technical standards themselves but rather the
2 policy and the classification standards and
3 requirements that we're meeting here today about.

4 It is our view that the specific
5 technical standards in question clearly define
6 the technical requirements for how the technology
7 and equipment in this category is to be designed,
8 how it must function, how it must communicate and

9 report, how it must account for the game plan
10 events. These standards further outline the
11 security integrity levels required for every
12 component. These are not dissimilar to many
13 other technical standards used throughout the
14 global gaming industry.

15 From these standards, we have been able
16 to develop test scripts to test, verify and
17 certify the type of technology used in this
18 sector, and we'll be able to confidently make
19 recommendations to the appropriate regulatory
20 authorities.

21 It is important to note, while BMM will
22 evaluate the technical standards and develop

2 systems and software does in fact comply with the
3 adopted technical standards, we will not make or
4 recommend a policy determination.

5 If there's question on the meaning or
6 intent of a certain technical standard, which by
7 nature will be a policy question, we refer these
8 questions back to the regulatory authority for
9 formal interpretation, clarification or opinion.

10 We would then adjust our technical test scripts
11 and processes to ensure they are consistent with
12 the policy requirements and objectives.

13 We submit all findings and
14 recommendations to the approval for the specific
15 regulatory authority before any given
16 jurisdiction. As an independent test lab, we are
17 very conscious that we are not ourselves a
18 regulatory authority.

19 We want to reiterate in BMM's view, that
20 our role as an independent test lab is to certify
21 the equipment and software that's used by the
22 industry complies with the technical standards

1 that are written to uphold the regulatory and
2 policy requirements and objectives in a given
3 regulatory authority.

4 Again, it is not our role to weigh in on
5 what should or should not be the policy outcome
6 but rather help create and test against technical
7 standards to ensure compliance with the
8 regulatory authority's policy objectives.

9 Given this, it would be inappropriate
10 for us to comment on classification standards
11 here today. This is a policy and legal question
12 and as such outside our purview. We are not a
13 stakeholder in the overall outcome of this
14 process. We do not represent a sovereign tribal
15 nation, any particular gaming equipment or system

16 manufacturer. We are not a distributor or an
17 operator, and as noted above, we are certainly
18 not the regulator. These are the constituencies
19 who, quite legitimately, have an interest and
20 stake in the outcome of these procedures.

21 Our position as an independent test lab
22 as an overall process is to test equipment to a

1 known accepted technical standard and remain
2 unbiased in the process. The need for any test
3 lab to remain independent is essential to the
4 overall integrity of this process and the health
5 and accountability of the overall industry and
6 the need to remain independent requires that we
7 do not have a vested interest or an agenda.

8 For an independent test lab to take such
9 an advocacy position undermines the credibility
10 and integrity of the organization. In this
11 context, BMM will not offer an opinion or
12 advocate a position for or against the published
13 classification standards.

14 CHAIRMAN HOGEN: Thank you. Before we
15 turn to public questions or comments, I would
16 like to ask the lab folks a couple of questions.

17 Mr. Farley, if NIGC would adopt what's
18 on the drawing board or something like it, I
19 think it would be the first time we would in
20 effect have a set of standards that we would ask
21 an outsider, a lab, to test.

22 Do you currently go through any similar

1 exercise with other regulatory bodies or
2 governments and, if so, can you describe how the
3 process works?

4 MR. FARLEY: Yes, certainly. Other
5 regulatory bodies have adopted technical
6 standards or classification standards or rules or
7 regulations, whatever you want to call them. We
8 use them as guidelines to write our own test
9 scripts and test plans.

10 Once those test plans are in place, we
11 can, you know, begin testing. In fact, sometimes
12 we can test without the test plans, provided that
13 the standards are clear enough.

14 It is commonplace that games will be
15 designed that don't quite fit within the box of
16 what the rules, regulations or standards are, and
17 in those instances, we rely upon the regulatory
18 agencies to work with us cooperatively to try and
19 get answers to questions on games that might not
20 fit squarely within the box.

21 CHAIRMAN HOGEN: Is there then a

1 agency before the matter comes to a conclusion

2 MR. FARLEY: Absolutely. Absolutely.

3 We would intend to work cooperatively with the
4 NIGC when standards are adopted. In fact, we
5 would welcome you to come to our lab and work
6 with us, so that as we go through our process, we
7 can discuss what it is, how it works, and kind of
8 bounce it off of each other.

9 CHAIRMAN HOGEN: One of the concerns
10 that NIGC had as we drafted what we've drafted so
11 far was that we wanted to avoid NIGC becoming a
12 bureaucratic bottleneck in terms of getting out
13 opinions or whatever.

14 I realize this is a very hypothetical

15 question, but if something like what we now have
16 on the drawing board comes to pass and suddenly
17 there is a send it to the lab and get it
18 certified requirement, how is the capacity of the
19 lab world situated to deal with something like
20 that, and is it realistic to take an approach
21 like this, in your view?
22 MR. FARLEY: I think it's realistic to

100

1 take the approach. Someone before the panel
2 started this morning asked me a similar question
3 as far as, you know, lab capacity and if all this
4 goes through, how long would it take to get
5 something through the lab?
6 What I see on the table I don't think

7 would fall outside of our, you know, standard 30-
8 day turnaround time. Of course, you know,
9 getting inundated with everybody all at once, you
10 know, eventually creates a queue, but, you know,
11 I think that we would have the resources to
12 handle that, and I think our competitors would
13 probably comment likewise, that, you know, it
14 would be realistic for us to be able to handle
15 it, and I think that the three labs that have
16 been involved in this since the beginning have
17 enough experience in, you know, cooperation with
18 your agency that I think we can make this work.

19 CHAIRMAN HOGEN: Mr. Pawlak, would you
20 care to comment on those two areas; that is, do
21 you deal with similar frameworks and what about
22 the capacity and the turnaround time and so

1 forth?

2 MR. PAWLAK: Yes, we definitely deal
3 with similar frameworks. It's a pretty typical
4 framework that you find in most regulatory
5 bodies. There's certainly dialogue that goes on
6 with questions, you know, and it varies from
7 jurisdiction to jurisdiction, you know, the
8 interpretation of what is the elements of a game,
9 you know, when the game starts and when it ends
10 and are there bonus features or bonus mystery
11 features, jackpot features, as they go on, will
12 vary from regulatory body to regulatory body.

13 So, dialogue is very normal. Usually
14 there's a point of contact and what we do is we
15 keep a database and when those questions were
16 answered who answered them and hopefully there's
17 one designated point of who determines it.

18 Some regulatory bodies require a
19 committee decision. Those are obviously much
20 longer decisionmaking process for simple

21 questions, but, you know, we certainly work

22 within those boundaries.

102

1 I think the timeline, the six months, is
2 going to be very difficult for the entire
3 industry to comply with. Development is not as,
4 you know, -- they've been published and they've
5 been out there, but the timeline is tight.

6 If you look at any sort of new platform
7 and development of that, it's sometimes months
8 between iterations as they make their tweaks and
9 get them tested and reverified and, you know, one
10 component of software will break another
11 component of software that's completely
12 unrelated.

13 If you think about, you know, how many

14 manufacturers are involved, the different
15 departments, other projects and other, you know,
16 areas of the market that they work in, dictating
17 time and resources to this could make that six
18 months very, very challenging.

19 COMMISSIONER CHONEY: I have a question
20 of Mrs. Reese.

21 How would the state react when you
22 report to them that your field investigators come

103

1 back and report to you that they go out and make
2 a site visit and they'll look at a machine and
3 they can't tell the difference whether it's a
4 Class II or Class III?

5 MS. TOLTON-REESE: I think that's one of

6 the difficulties that we're trying to point out.
7 I think in the rules and regulations, it should
8 be clear enough that an agent, whether it's
9 tribal, state or federal, should be able to look
10 at a machine and be able to tell without having
11 to tear it apart.

12 CHAIRMAN HOGEN: As with the previous
13 panel, I would hope that you folks would be
14 responsive to questions that the Commission might
15 want to submit following this testimony.

16 With that, we'll say thank you very
17 much. Wait a minute. We're going to get public
18 comments and questions.

19 So, at this point, are there comments or
20 questions that pertain to these areas, the
21 viewpoint of the states, the viewpoints of the
22 lab testers, or how it all comes together?

1 MS. STEVENS: I'm not sure what I just
2 signed, but I hope when I get home, my firstborn
3 is there.

4 My question is to Sharon Reese. My name
5 is Tracie Stevens. I'm with the Tulalip Tribes
6 of Washington.

7 There was a comment that you made in
8 your testimony that there was some outright
9 illegal activity going on. What do you mean by
10 that comment? Are you finding that -- is the
11 Gambling Commission finding that there's Class II
12 -- proclaimed Class II machines that are really
13 Class III machines?

14 I mean, with the commissioner's question
15 about not being able to pass the smell test on
16 site, --

17 MS. TOLTON-REESE: I think my script
18 read that there was the potential for illegal
19 activity without clear regulation.

20 MS. STEVENS: Well, in speaking to my
21 council member last night, the question he wanted
22 me to ask was is there some evidence that there's

105

1 a problem that the Gambling Commission feels a
2 need to speculate as to whether there's a Class
3 II/Class III blurry line that we haven't
4 addressed with the NIGC or through our own gaming
5 agency?

6 MS. TOLTON-REESE: I think in terms of
7 my general comments, speaking from the state
8 perspective as a whole, the reason there are
9 agencies like ours is just to prevent those kinds
10 of problems, and the testimony and the records
11 that I've been reading reflect on a lot of the
12 things that the NIGC has already responded to in

13 terms of illegal activities.

14 So, it was a very general comment, not
15 specifically speaking to anything in Washington
16 State. Clearly, with as many compacts as we have
17 negotiated with tribes that are successfully
18 opened and operating, we've had very limited
19 issues related to any negative activity with
20 regards to gambling.

21 MS. STEVENS: Okay. Thank you.

22 MS. TOLTON-REESE: You're welcome.

1 MR. BOON: Still good morning. My
2 name's Doug Boon. I'm the CEO of Little Creek
3 Casino Resort. I work for the Squakin Island
4 Tribe in Washington State.

5 I wanted to address the question that
6 Commissioner Choney had asked of Ms. Reese
7 earlier. It's my belief as an operator and
8 representing the tribe that I represent as an
9 operator that the courts have made a very clear
10 decision at this point what constitutes Class II
11 gaming and what constitutes Class III gaming and
12 that there is no blurry line if they're operating
13 the Class II machines today, the ones that have
14 been approved by the NIGC and if they follow
15 those distinctions that have already been laid
16 out by the courts.

17 What we see here is an attempt to change
18 the format of the gaming that we have currently
19 that's authorized and has been authorized and
20 upheld through various litigation, a fundamental
21 change to those things in order to make that
22 classification different than it is today, and I

1 really don't think that if you follow the rules
2 as they're established right now today, there is
3 no blurry line about whether or not it's a Class
4 II game or whether it's a Class III game or
5 whether it's a bingo game or whether it's not.

6 There's an identifiable bingo screen
7 that must appear on the thing. I mean, there's a
8 number of rules that must be followed, and any
9 person who knows anything about Class II or Class
10 III electronic gaming, as long as the games are
11 ones that are approved, can clearly see those
12 distinctions and there really is not a blurry
13 line, and I think that that definition is kind of
14 being thrown out here, and it's not one that's
15 adequate to cover where we're at.

16 So, thank you.

17 CHAIRMAN HOGEN: Thank you. And if I
18 just may respond to that comment for a moment.

19 The courts have addressed basically two
20 different formats or devices. One was the Mega
21 Mania bingo game, and it was an electronic player
22 station that interconnected players sometimes at

108

1 different locations around the country, and you
2 couldn't start that game until you had 12 players
3 to play and they had four cards on their device
4 and they had to participate in that they had to
5 chip up or ante up or decide if they were going
6 to ante up to continue to play or if they wanted
7 to drop cards, so forth, and it took 60-90-120
8 seconds to play those games.

9 The games that are in play as Class II
10 around many places in the country right now are
11 played almost instantaneously; that is, you push

12 the button and in a heartbeat, the game is over.
13 The game that we would permit under
14 these proposed regulations would permit as few as
15 two players to play and permit it to be played in
16 just over eight seconds. I think that's a
17 dramatic difference from what the court approved,
18 and I think it moves in the directions the tribes
19 would want us to go; that is, to be more
20 flexible, and I realize, and we're going to hear
21 from the lawyers here in a minute, that we can
22 argue about, well, what conclusions can you reach

1 from what the courts have said, but to say that
2 the line is already clear, I so wish that were
3 true.

4 I would have spent the last three years
5 a whole lot different than I did spend it, if
6 that were true. We're trying to get there, and I
7 understand there are different points of view,
8 but, you know, clarity, I continue to think is
9 needed, and not that I'm dismissing your view or
10 your comment, but I want you to understand, you
11 know, some of our concerns.

12 MR. BOON: Thank you.

13 CHAIRMAN HOGEN: Charlie?

14 MR. LOMBARDO: Yes, sir. Charlie
15 Lombardo, Senior Vice President, Gaming, for
16 Seminole Tribe of Florida.

17 My question's for Sharon Reese. Could
18 you clarify for me, please, when either you or
19 one of your agents go out into the field, are you
20 saying that you cannot today distinguish the
21 difference between the compacted games in
22 Washington and the Class II games?

1 MS. TOLTON-REESE: I can honestly tell
2 you we don't spend a lot of time in Class II.
3 That's not our jurisdiction at all. What we're
4 concerned with is some of the games that have
5 been converted, the games that we have been
6 discussing that we had no issue with initially
7 and now are being converted to games that don't
8 look like bingo anymore.

9 So, we believe that some of those games
10 potentially should be discussed as compacted
11 issues, yes.

12 MR. LOMBARDO: So, you're saying --

13 MS. TOLTON-REESE: But we haven't spent
14 a lot of time looking at them. We do have a lab
15 and our lab looks at games occasionally, but for
16 the most part, we're looking at Class III games.

17 MR. LOMBARDO: So, you're saying then

18 that you have not tried to distinguish the
19 difference between the two, haven't gone out to
20 look and see if there's a difference?

21 MS. TOLTON-REESE: I think our lab has
22 looked at them, but I don't know that our agents

111

1 have spent a lot of time going into Class II and
2 Class III and making comparisons. I don't think
3 our tribes -- I'm not aware that it's been an
4 issue with our tribes yet. We're just trying to
5 preclude that.

6 MR. LOMBARDO: Okay. Thank you.

7 MS. TOLTON-REESE: You're welcome.

8 CHAIRMAN HOGEN: Yes, sir?

9 MR. SMITH: Yeah. I'm Jahn Smith,
10 Director for the Stillaguamish Gaming Commission.

11 To help Sharon Reese out here just a
12 little bit, I'm from Washington State, and the
13 Washington State agents do do a very decent job.
14 They have gone through and walked through our
15 Class II areas to define whether or not the bingo
16 card is actually placed on that machine. So,
17 they are doing a very good job.

18 Washington State Gambling Commission and
19 ourselves work very, very closely. A lot of our
20 regulatory issues that we have with our Class
21 IIIs, we duplicated everything that we have for
22 our Class II machines.

1 I believe that the NIGC needs to take a
2 look and put some faith into the regulatory

3 bodies that we do have in place right now as far
4 as our tribal gaming offices.

5 I guess I look at the proposals that the
6 NIGC is trying to put forth and I can't see to
7 where the machine's broken, you know. If the
8 machine's broken, I can understand fixing it, but
9 why fix it now if there's nothing broken?

10 The regulators, as far as the
11 Stillaguamish Gaming Commission goes, we are able
12 to understand, you know, the difference between a
13 bingo machine, the card's there, it is considered
14 a Class II.

15 I guess you might say -- actually, a
16 rose by any other name is just a rose. Bingo is
17 just bingo, whether it's chiseled out on a rock
18 with pebbles placed on it or whether it has an
19 electronic facsimile that's attached to it. It's
20 still just bingo.

21 I think the NIGC's trying a little too
22 far in trying to establish that this is something

1 more than it is.

2 Thank you.

3 CHAIRMAN HOGEN: Thank you. Yes, sir?

4 MR. BUFFALO: Henry Buffalo. I

5 represent the Fond du Lac Band of Lake Superior

6 Chippewa in Minnesota.

7 Hey, Tom. I couldn't let you get off

8 that easy.

9 I just want to address a couple comments

10 that Tom had made. It's interesting that Tom is

11 sort of twisting this to make the states victims

12 of the Class II technological advancements that

13 tribes have actually had to come up with as a

14 result of states' refusals to negotiate for Class

15 III machines, and I think, Tom, the hammer that

16 you spoke of is not the Class II devices.

17 The hammer that you forget about is the
18 states' argument that they are immune from suit
19 when it comes to the question of whether or not
20 they negotiated in good faith or failed to
21 negotiate under the IGRA.

22 Now, you remember those discussions and

114

1 the IGRA was a compromise. You remember that the
2 states wanted in after Cabazon. After Cabazon,
3 they said the states were completely out. The
4 IGRA was a compromise and immediately after its
5 passage, it wasn't the tribes who began
6 developing Class II alternatives, it was the
7 states who brought the lawsuit claiming immunity
8 from suit, even though they agreed that they
9 would participate in the IGRA and negotiate with

10 tribes over Class III. That's what they claimed

11 was their interest.

12 So, the hammer, Tom, is not Class II

13 innovations. The hammer was the immunity suit

14 that the states brought, leaving the tribes with

15 no other opportunity to force states to

16 negotiate. The Act knew historically that tribes

17 and states would not be able to figure this out

18 on their own and they needed some independent way

19 to do that.

20 Unfortunately, the states prevailed. We

21 don't have that way and that's why we have

22 innovations. I don't believe there's any

2 the Act, as a participant in the drafting and the
3 lobbying of that, did not seek to restrict the
4 tribes. Instead, what they wanted to do was they
5 wanted to let the marketplace decide that.

6 I think our concern -- we forget that as
7 regulators. Our concern is, as the guy from the
8 lab said, with respect to those machines, is how
9 they function, how they're designed, how they
10 communicate, and how they account. That's what
11 we need to focus in on, not what the type of the
12 game is or the innovation that has developed as a
13 result of the lack of other opportunities.

14 Thank you.

15 CHAIRMAN HOGEN: Do you care to respond,
16 Mr. Gede?

17 MR. GEDE: If I may. Thank you. Thank
18 you, Henry.

19 I don't disagree with you entirely, and
20 I would point out, though, I think that it's a
21 vast majority of states that have consented to
22 suit in federal court, and it's a small, very

1 small minority of states that have maintained
2 their effort to hold on to sovereign immunity,
3 and I frankly think the states should sit down at
4 the table, and I frankly think they should waive
5 their sovereign immunity and negotiate in good
6 faith. That's their obligation, really, not only
7 in federal law but given the landscape, moral,
8 legal and the like, to sit down with the tribes
9 and work these things out.

10 But the technological issues, I think,
11 are going to either have to be resolved as best
12 they can by the NIGC or by Congress because
13 Congress provided for a Class II, but it also
14 provided that an electronic or an
15 electromechanical facsimile of a game is Class

16 III. So, the Commission has stuck with the
17 difficulty of making that distinction, but it
18 can't ignore it and just assume that bingo,
19 however played, is Class II. The law just
20 doesn't provide for that.

21 CHAIRMAN HOGEN: One more question here
22 before we break.

117

1 MR. PARKER: Gentlemen, it's a two-part
2 comment.

3 The first one is regarding the machine
4 certification. Our tribe feels the machine
5 certification process does not afford due
6 process. The NIGC gives itself sole authority to
7 certify the labs who then certify the game
8 classification. This includes no appeal

9 provision for the laboratories and limits the
10 tribe's rights to a hearing.

11 The most egregious part of the
12 certification requirement to our tribe is the
13 Commission objections can be raised at any time.
14 The Chairman or his designee may object to a
15 certification process within 60 days. If no
16 objection is raised within 60 days, the testing
17 laboratory, requesting party or sponsoring tribe
18 may assume the Commission does not object.
19 However, nothing is precluding the Commission
20 from objecting after 60 days, upon a showing of
21 good cause.

22 Again, I'm kind of wondering how I

1 explain this to my tribe, that although we
2 followed all the rules the NIGC had placed forth
3 before and we didn't actually see anything broken
4 with your classification standards, the way that
5 you classified Class 2 games previous.

6 You folks change the rules in midstream
7 and then after setting these far-reaching new
8 rules, a Class II game or system is still not
9 safe after having been subject to the
10 certification standards even after a 60-day
11 objection window.

12 The second point we've got is the
13 effective date and compliance deadlines, we feel,
14 are inadequate to allow the tribes and
15 manufacturers to design, certify and implement
16 games which are compliant. So, I agree with the
17 gentleman at the end of the dias up there.

18 The NIGC should strike Section 546-
19 10(e)(3). Currently, it takes six to eight weeks
20 to deliver a preapproved Class III game in the
21 State of Washington. There's no possibilities
22 that vendors can design a game or system to NIGC

1 specifications, get the submission through the
2 company's own quality assurance program and still
3 get the gaming lab's -- and through the gaming
4 labs within six months.

5 Add the laboratory certification
6 process, its place in the queue and the vendor's
7 ability to get the product out in a current Class
8 II market of over 50,000 machines, you're looking
9 at more than a 16-month window by our standards.

10 NIGC must insert a tiered implementation
11 of regulations that will allow for an orderly
12 transition or change-out of equipment.

13 CHAIRMAN HOGEN: Thank you. And you
14 raise some very valid concerns, and with respect

15 to, you know, where or how can we improve a place
16 for tribes to appeal or ask for review, we're
17 eager to hear specific proposals in that
18 connection.

19 With respect to is there no limit to
20 when NIGC can come along and say, hey, we don't
21 agree with that, I would hope that would never
22 happen, but before it finally happens, I think

120

1 there would be the dialogue that Mr. Farley
2 mentioned, you know, between the labs and, I
3 guess, the designers and the regulatory body to
4 try to avoid those kinds of situations, but we
5 appreciate the reality and we understand that the
6 time frames may not be what they ought to be, but
7 we're working on that.

8 But to stay on schedule, we are going to
9 wrap this one up. Again, thank you to the panel.
10 We ask the Attorney Panel to assemble. We hope
11 to conclude that so we can then go to lunch and
12 be back with the following panel at 1:55. So,
13 take a couple of minutes to change panelists and
14 then we'll resume.

15 Thank you.

16 (Recess.)

17 CHAIRMAN HOGEN: Throughout the long
18 exercise of meeting with the Tribal Advisory
19 Committee and certainly there have been and will
20 be criticisms of how some of that was conducted,
21 one of the concerns expressed was there are a lot
22 of legal issues here. You're not letting the

1 lawyers participate to the extent that they ought
2 to and to attempt to address that, we have
3 invited several of the attorneys who have been
4 extremely active and informed, I think, in this
5 area.

6 We have Michael Anderson from the
7 Monteau and Peebles firm, Liz Homer from the
8 Homer Law Office, Liz being a former member of
9 the Commission, of course, and Joe Webster from
10 the Hobbs, Straus, Dean and Walker firm, and Judy
11 Shapiro of Shapiro Law Office.

12 So, with that said, we'll call on Mr.
13 Anderson to make a presentation.

14 Panel 3 - Attorneys

15 MR. ANDERSON: Thank you, Mr. Chairman,
16 and members of the audience, both tribal
17 representatives and state representatives.

18 I'm Michael Anderson of the Washington,
19 D.C., office of Monteau and Peebles, and our
20 testimony today reflects testimony prior
21 submitted to the Commission from the Gun Lake

1 Chunsanian Indians, and the Mechuptia Indians of
2 the Chico Rancheria.

3 My statement today will summarize some
4 of that prior testimony and also make a couple of
5 new requests.

6 Our prior testimony discussed the
7 restricted nature of the new Commission
8 regulations as proposed and our view that it
9 conflicts with a number of decisions from the
10 circuit courts, both in the 8th, 10th and 9th
11 Circuits.

12 I will not go into the details of those
13 statements, those are in our record, but I did

14 want to focus on the economic impact issue.
15 We believe there is a strong need for
16 more analysis on the economic impact of these
17 regulations, particularly with respect to
18 transition time. You've heard from our other
19 witnesses today that there is going to be a lot
20 of time needed to convey all of the games that
21 are currently not applicable or not compliant
22 with the new regulations and to change the floor

123

1 and go to manufacturers to either change the
2 hardware technology and the floor make-up of
3 those new games. That is going to require a lot
4 of time, both in negotiating contracts and
5 finding out things like do royalties still get
6 paid if the games are no longer compliant with

7 regulations by the Commission, and also just the
8 demand on manufacturers to provide these games.

9 So, there is going to be a lot of cost
10 to the transition time that's going to be needed
11 for these regulations if they are passed. That's
12 aside from what we think are the substantive
13 fundamental flaws in the legal analysis and
14 support for these regulations.

15 There's also going to be an overall
16 impact on reduced income from tribes, and you've
17 heard it today, both from individual tribes
18 talking about devastating impacts to their
19 facilities and also just the national impact.
20 There is going to be less entertainment value of
21 these new games. There is going to be slower
22 time for play. All of these are going to be very

1 relevant to what the final regulation should say
2 and also how they're analyzed by the public.

3 There are consultation standards by the
4 Commission and it's a good policy, if it's
5 followed. You've handed out today the policy
6 developed with some tribal input, but what that
7 notes in the tribal consultation procedures and
8 guidelines is that the Commission will promptly
9 notify the affected tribes and initiate steps to
10 consult and collaborate directly with tribes
11 regarding the proposed regulation.

12 I would argue that that has not happened
13 completely in this instance, particularly in
14 terms of collaboration on these economic impacts.

15 There has been some case law in other
16 jurisdictions and dealing with other agencies on
17 the importance of consultation and the standards.

18 The recent case of Yankton Sioux Tribe v.
19 Kemthorne dealing with this agency, the
20 Department of Interior, on July 14th, 2006, is

21 very instructive.

22 The judge was not very kind to the

125

1 department in that analysis. He said that the
2 defendants, the DOI in that case, did not notify
3 the tribes that their structuring could result in
4 the loss of funding to Indian schools. The
5 plaintiffs there demonstrated they are likely to
6 succeed on their claim that the BIA failed to
7 inform the tribes of the impact of the proposed
8 federal action in violation of the BIA's
9 government-to-government consultation policy.

10 In the end, the judge found that fair
11 notice of agency intentions requires telling the
12 truth and keeping promises. The school, the BIA

13 must include a candid discussion of what funds
14 will be used to pay for the reorganization.
15 Here, very high standards of what the agency
16 should say to the regulated public, and in this
17 case, most importantly, Indian tribes.

18 Chairman, you and I had a discussion
19 during our consultation with Gun Lake about these
20 issues of economic impact, and I wanted just to
21 read a couple of the exchanges that you were
22 generous enough to partake in in terms of our

126

1 dialogue.

2 The question was about how many machines
3 currently meet the current definitions that are
4 proposed in terms of the bingo screen and the
5 display. You said that, "We've seen in the

6 process of writing advisory opinions over the
7 years quite a large number of different models
8 and approaches. Not all of those, of course, do
9 what is currently configured to accommodate half
10 the screen to be the bingo card or half the
11 display area, although there are others that do."
12 So, I think it's an answer to the question.
13 "Are there any out there?" "Yes, I
14 think there are some." Some but no answer as to
15 how many. "Are we looking at 10, 15, 20,000
16 machines that are compliant now or not?" It's
17 the kind of information that would be helpful to
18 analyze these regulations. Are we talking about
19 a small percentage of games that don't currently
20 meet these proposed regulations or, as many have
21 said, almost all the games?" Huge difference
22 between the opinions of the regulated agency and

1 the tribes.

2 We talked a little bit about transition
3 time. "What would be needed in terms of time to
4 change these machines to come up with figures
5 like the 49 percent display?" There was not any
6 answer given in terms of what that would be. The
7 answer given from you, Mr. Chairman, was, "Have
8 we made inquiry into this area? Yes. Have we
9 completed that exercise? No. What we want to
10 know not only in this process but as we know, as
11 you know, reach out elsewhere, try to get our
12 arms around this and gather more information,
13 and, you know, if we can find that it just can't
14 be done or that it can't be done economically, in
15 an economically viable fashion, we need to
16 rethink it. We haven't seen the analysis that
17 was promised there that there would be some type
18 of getting the arms around this issue about what
19 the economic impact would be."

20 Finally, and this information is all in
21 the transcript of our meeting, you noted, "Well,
22 what we have -- looked seriously at the impact,

128

1 particularly with respect to the timing of the
2 play, how many games you can play in a day and so
3 forth. We aren't finished with that exercise.
4 We'll continue that and yes, we can contract
5 folks. We do have a contract with BMM, which is
6 a gaming lab, but that isn't exactly their main
7 area of activity, but they have data that would
8 be useful in connection. We would welcome, you
9 know, anyone else's input.

10 In terms of what kind of an economic
11 impact analysis have we done, should we do, the

12 concern that I have expressed before and still
13 have is I'm not sure it's useful to study
14 something that might currently be unlawful; that
15 is, if devices are being played purportedly as
16 Class II but in reality under almost any test
17 wouldn't fall under the Class II area, should it
18 make a difference that enforcement of the law
19 would, you know, curtail and make that less
20 profitable?"

21 Finally, "We don't want to put something
22 on paper that just devastates, ruins the Class II

1 industry. We don't think we're headed in that
2 direction, but certainly it could have an impact.
3 So, a number of areas, games, impact, all alluded
4 to by the Commission as something that's very

5 important, that's something that we would need
6 further information on, but to date, no
7 information is available for the tribes."

8 So, as I conclude my time, a couple
9 requests here. It's not unusual for agencies to
10 do analysis or entities other than agencies. The
11 tribes do economic analysis in their NEPA
12 documents. Very common.

13 When Congress wants a bill, they have
14 the CBO do an economic impact analysis for them.
15 So, what we are requesting today is that there be
16 an extension of the September 30th deadline, that
17 there be a supplemental comment period on the
18 economic analysis impact issue, that there be
19 some type of process to agree on what the
20 methodology is for that economic impact analysis.

21 For example, how many games are we
22 looking at in Class II that would be affected?

1 How much reduced player time is at issue here?
2 Eight seconds, 10 seconds, more? There could be
3 a range of scenarios from no impact that the
4 Commission might believe is at issue here or
5 hundreds of millions or billions in terms of what
6 the tribe believes, but at least there would be
7 an agreed-upon set of parameters that we could
8 look at together, consistent with your statements
9 that we would collaborate together.

10 Likewise, on the overall economic impact
11 analysis, there needs to be some bridging of this
12 huge gap between the tribal expectations of what
13 this rule would do and what the NIGC would do.

14 So again, we would ask that there be an
15 opening of this comment period and then once that
16 information, if the Commission agrees, is
17 submitted and reviewed by the community, tribal
18 regulated community and others, that there be a

19 comment period on that as well. So that is our
20 request and our plea for you today, Mr. Chairman.

21 Thank you.

22 CHAIRMAN HOGEN: Thank you. Ms. Homer?

131

1 MS. HOMER: Thank you, Chairman Hogen,
2 and Vice Chairman Choney.

3 I want to express my appreciation for
4 the invitation to speak here today. I know that
5 I've been hounding you around the country on this
6 issue and I really appreciate the opportunity to
7 do so again here today, and on par with my usual
8 concern about this, I think that you all know
9 that this did occupy a very large part of my
10 tenure on the NIGC, this issue of Class II

11 gaming, and as you know, in 2002, the NIGC, the
12 Commission, a majority of the Commission,
13 replaced three key regulatory definitions that
14 had been originally adopted by the NIGC in 1992
15 because these definitions and because the courts
16 had expressed a very strong disapproval of the
17 NIGC's definition which was a very distressing
18 thing, particularly since the Indian Gaming
19 Regulatory Act is centered on, it's based upon
20 the classification of games.

21 So, to have the federal courts say to us
22 not only did you, NIGC, get it wrong in your

1 interpretation of the laws substantively, but we
2 find your regulations absolutely and completely
3 unhelpful because they don't do anything more

4 than tell us that a Class II gaming device is
5 something different than a -- it can't be a Class
6 III gaming device.

7 The courts were very harsh in their
8 criticism. They refused to give the NIGC the
9 deference to which most federal agencies are
10 entitled under the Chevron standard and it was
11 distressing as the heads of this agency faced in
12 making these distinctions to have received such a
13 vote of lack of confidence by the federal courts.

14 You know, we had been encouraged, much
15 as you are, you have been, by the Justice
16 Department to kind of stay the course, you know,
17 a duck is a duck, you know, if it quacks, it's a
18 duck, and if it has spinning reels and it looks
19 like a slot machine and acts like a slot machine,
20 by golly, it must be a slot machine, and urged
21 the Commission to basically disregard what the
22 courts were saying with respect to what was

1 permissible within the scope of electronically-
2 aided Class II gaming.

3 I don't see these things to be funny.

4 We took this responsibility very seriously and we
5 weren't trying to be heroes and make everybody
6 happy, I think, as some have criticized that
7 Commission, but instead to take very seriously
8 our legal responsibilities as the head of the
9 agency to ensure that our interpretation of the
10 law was proper, was correct, was consonant with
11 the case law as was handed down by the federal
12 courts, and to eliminate these so-called lack of
13 distinction between Class II and Class III gaming
14 which we viewed basically after hours and hours
15 and months of deliberation as simply a
16 misunderstanding as to what is the, as the court
17 asked in Mega Mania, the essence of IGRA.

18 What is the essence of IGRA, and what
19 went wrong? Well, what went wrong was the
20 entanglement between the Johnson Act, which deals
21 with gaming devices, and IGRA, which deals with
22 games, and I think that that was the first

134

1 epiphany that we had in terms of trying to flesh
2 out regulatory definitions that created true
3 elements, true legal elements that could be
4 applied at all times to all forms of equipment in
5 a way that will get us a relatively reliable
6 result by applying these standards.

7 We feel, at least I feel and at the time
8 felt that the definitions that we came up with
9 respect to electromechanical facsimile, for

10 example, electronic aids make that distinction.

11 Now, I know that we've had discussions
12 and you do not necessarily agree with that, but I
13 nonetheless feel that it was sound and I believe
14 that both the 8th and 10th Circuit Courts of
15 Appeals have had opportunity to take a look at
16 those regulatory definitions and did so with
17 favor, and I think that that is a legally-
18 significant fact, and I think that while we're
19 not wanting to be critical of what the NIGC is
20 doing, the NIGC has a special role to play.

21 IGRA was created at a special time in
22 history when the federal policy was becoming much

1 more favorable. NIGC was created and staffed
2 with people that are tribal members. There's a

3 reason for that. There's a reason why the NIGC
4 was created as an independent federal regulatory
5 agency, so that it wouldn't be subject to the
6 political whims and pressures that might be
7 brought to bear by other governmental entities,
8 such as state governments, by other agencies
9 within the Executive Branch.

10 The NIGC has the freedom and the power
11 and the authority and the obligation, I would
12 assert, to do the right thing for the tribes, to
13 interpret the law in a way that ensures Indian
14 Country is able to take full advantage of the
15 benefits of IGRA as intended by the Congress, and
16 I will close with that statement.

17 Thank you.

18 CHAIRMAN HOGEN: Thank you. Mr.
19 Webster?

20 MR. WEBSTER: Good afternoon, Mr.
21 Chairman, Commissioner.

22 My name is Joe Webster. I'm a Partner

1 with the firm of Hobbs, Straus, Dean and Walker
2 here in D.C.

3 I've been involved with the Class II
4 issue since the early 1990s on behalf of a number
5 of clients, including the Seminole Tribe of
6 Florida and a variety of tribes in Oklahoma.
7 I've also been extensively involved in the
8 advisory opinion process for Class II games.

9 More recently, I've been involved, along
10 with the other members of this panel, in actively
11 tracking and commenting on the NIGC's Class II
12 rulemaking process.

13 When Congress passed the IGRA in 1988,
14 it affirmed, consistent with the Supreme Court's
15 decision in Cabazon, the right, and it is, it's
16 a right, of tribes to offer a broad range of

17 bingo and bingo-type games if such games were
18 otherwise generally permitted under state law.
19 It also expressly authorized tribes to play such
20 games using technologic aids and it was clear
21 that tribes should have "maximum flexibility" to
22 use modern technology to offer Class II games.

137

1 Now, of course, in the years since the
2 IGRA was passed in 1988, there have been
3 significant advances in the types of technology
4 available to play Class II games. These
5 advancements can be found in both Indian and non-
6 Indian gaming facilities and bingo halls.

7 For example, as many of you know, the
8 State of Alabama permits thousands of advanced

9 high-speed electronic bingo games to be offered
10 at a racetrack within the state. Those are
11 clearly bingo games, you know, one-touch games,
12 totally different than a slot machine, but those
13 are permitted under state law.

14 Even more traditional bingo minders have
15 advanced dramatically in recent years with many
16 offering numerous features to the player,
17 including full auto-daub and electronic accounts.
18 So, the advancements in technology for bingo are
19 certainly not limited to Indian facilities.

20 Despite these advances in technology,
21 the NIGC has proposed regulations that would
22 dramatically restrict the range of Class II games

2 these restrictions as necessary to draw a bright
3 line between Class II technologic aids and Class
4 III electronic facsimiles.

5 However, in our view, Congress and the
6 courts already have drawn a clear line and the
7 additional restrictions proposed by the
8 Commission must certainly only muddy that
9 line.

10 Simply put, any game that meets the
11 three IGRA classification requirements for bingo
12 can be played with electronic aids as a Class II
13 game as long as the electronics are "readily
14 distinguishable from the use of electronic
15 facsimiles in which a single participant plays a
16 game with or against a machine rather than with
17 or against other players." That's quoting from
18 the Senate report that accompanied the IGRA.

19 Said another way, facsimile was
20 shorthand use by Congress to refer to games where
21 players play against the machine rather than
22 against other players. Now, this makes sense

1 since all of the list of Class II games, bingo,
2 pull tabs, instant bingo, lotto, et. cetera,
3 require competition between players.

4 Now, the courts have agreed with this
5 distinction. For example, in the Mega Mania
6 case, the 10th Circuit expressly stated that "the
7 aid is distinguishable from a facsimile where a
8 single participant plays with or against a
9 machine rather than with or against other
10 players." So, it's a very clear standard.

11 Now, not only have the courts and
12 Congress identified that standard to distinguish
13 between the two, the NIGC's current definition
14 regulations which Ms. Homer referred to reflect
15 this clear line.

16 The current definition found at 502.8
17 says that a Class II game can be played in an
18 electronic format as long as "the electronic or
19 electromechanical format broadens participation
20 by allowing multiple players to play with or
21 against each other, rather than with or against
22 the machine."

140

1 So, there is no confusion. The NIGC's
2 current definition is clear. It's consistent
3 with the legislative history of the IGRA, and
4 it's consistent with the case law. There simply
5 is no basis for the NIGC to change the existing
6 definition which provides both clarity and game
7 design flexibility, especially since, as I said,

8 it is supported by both case law and the language
9 of the IGRA.

10 In sum, the IGRA and the Commission's
11 existing regulations provide adequate guidance on
12 game classification. There is no need for the
13 Commission to change the definition of facsimile
14 or add an entirely new Part 546 to impose onerous
15 new classification requirements.

16 The result of this proposal would be to
17 limit Class II gaming to a very narrow range of
18 games that would have very little, if any,
19 commercial viability. Further, the proposed
20 technical standards, while well intentioned,
21 would make Class II games extraordinarily
22 expensive to produce and maintain.

1 Rather than move forward with
2 classification regulations that are fundamentally
3 flawed, we urge the Commission to withdraw those
4 proposals and instead focus on developing
5 reasonable Class II technical standards. The
6 current proposal contains many good elements, but
7 there are also many provisions that are overly-
8 restrictive or simply unnecessary.

9 We are advised that the technical
10 standards alone are likely to prevent the
11 development of commercially-viable Class II
12 games. With this in mind, we hope that the
13 Commission will make a new effort to reach out to
14 tribes and vendors to develop reasonable
15 technical standards to protect game integrity and
16 promote compatibility between game systems.

17 After the technical standards are
18 completed, the Commission could then take a fresh
19 look in cooperation with the tribes at whether or
20 not there is in fact any need to provide
21 additional guidance on classification issues.

1 opportunity to testify here today.

2 CHAIRMAN HOGEN: Thank you. Ms.
3 Shapiro?

4 MS. SHAPIRO: Good afternoon, Chairman
5 Hogen and Commissioner Choney.

6 Thank you for the opportunity to assist
7 the Commission to understand the distinction
8 between Class II and Class III games.

9 I have spent many years assisting tribes
10 to incorporate new technologic aids in Class II
11 gaming, and you are surely aware that I have been
12 closely following the Commission's development of
13 classification standards.

14 The vigorous dispute among the tribes,

15 the NIGC and the Justice Department concerns
16 whether a Class II technologic aid can be fast,
17 fun and lucrative, and whether such speed,
18 entertainment and profit blur the line between
19 Class II and Class III. I suppose I should add
20 the states to this dispute now, too. These
21 questions are not central to game classification,
22 only to economic viability.

143

1 The Commission's proposed rule adds
2 several arbitrary delays to bingo play.
3 Apparently the Commission believes that a Class
4 II game must be played slowly or at least slower
5 than technology might otherwise permit, but
6 nothing in the statute compels that result. The

7 statute is silent on time requirements. The

8 courts have not been.

9 In *Seneca Cayuga v. NIGC*, the 10th

10 Circuit found that an electronic player terminal

11 did not alter the classification of the

12 underlying pull tab game. Rejecting the DOJ

13 argument as based on superficial similarities

14 between the slot machine and the pull tab

15 dispenser, the court stated pull tabs, even when

16 sped up, placed under lights and depicted with a

17 spinning machine on the side, is still pull tabs.

18 The same reasoning applies to bingo.

19 Speed of play does not transform bingo into a

20 facsimile. Neither does a game's entertainment

21 value. NIGC advisory opinions consistently find

22 that an entertaining display on a terminal does

1 not transform bingo or pull tabs into a Class III
2 game, but speed and entertainment value taken
3 together are central to economic viability.

4 DOJ argues that Congress did not intend
5 to permit lucrative forms of gaming without
6 compacts, but tribes have been forced to develop
7 innovative Class II environments to compensate
8 for their failed power to compel good faith
9 compacting.

10 Even though Congress may not have
11 expected Class II gaming to be so lucrative,
12 neither did it expect it to be worthless. The
13 dictionary definition of lucrative is profitable.
14 IGRA's intent to facilitate economic self-
15 determination would be frustrated were Class II
16 gaming to be wholly unprofitable.

17 As proposed, the regulations would not
18 give necessary effect to the statute. Requiring
19 arbitrary time delays and multiple releases,
20 restricting card size display and range of

21 numbers, and demanding two-inch labels cannot
22 replace the distinction already created by law.

145

1 I'm very much aware that the Commission
2 believes that its own 2002 definitions were
3 mistaken and that it thinks new standards are
4 needed to define the line between Class II and
5 Class III gaming. With all due respect, I
6 believe that the Commission's good faith efforts
7 contain a fundamental flaw.

8 The Commission is not charged with
9 redefining the game of bingo. The Commission's
10 authority to regulate Class II gaming is granted
11 by statute, the same one that confirms the
12 tribes' right to conduct Class II gaming,
13 including technologic aids. That same statute

14 defines bingo with three criteria determined by
15 the 9th Circuit to be the sole criteria for the
16 came. The Commission's job is to implement that
17 statutory definition, not replace it.

18 I understand that the IGRA is not the
19 most effectively-crafted legislation. Tribes
20 have had to deal with its shortcomings. Congress
21 didn't take the time to define technological aid
22 or facsimile, but the Commission has some

1 resources to draw on. As other speakers have
2 pointed out, the report states the intent that
3 tribes have maximum flexibility in the use of
4 technology. It further explains that aids were
5 readily distinguishable from an electronic

6 facsimile, and I'll say it again, in which one
7 player plays a game with or against a machine
8 rather than with or against other players.

9 Over the past 18 years, readily
10 distinguishable has been a battleground. The
11 first Commission had a simple rule. Don't plug
12 it in. Too simple. Somehow bingo ball blowers
13 were permitted and the statute itself permits
14 numbers to be electronically determined.

15 The cases have clearly evolved to accept
16 play of bingo in electronic medium. Over the
17 Justice Department's strident objections, federal
18 appellate courts have found no problem with the
19 use of an electronic bingo card nor the
20 electronic daubing of that card.

21 For a bingo game, the primary question
22 remains whether the three statutory criteria are

1 satisfied and whether more than one player's
2 competing for the bingo prize, not just a single
3 player against a self-contained game.

4 Chairman Hogen, I remember clearly in
5 the Spring of 2003 when Seneca-Cayuga came down,
6 you spoke to the Oklahoma Indian Gaming
7 Association. You expressed satisfaction that the
8 court had deferred to the NIGC's definition of
9 technologic aids, the same decision you now
10 propose to set aside.

11 The court approved the Commission
12 reading that would be more likely to expand the
13 pool of tribal revenue through greater variety
14 and offerings. That court held that the Indian
15 Canon of Construction compelled the Commission to
16 resolve any ambiguities in a remedial statute to
17 the benefit of the tribes.

18 At that meeting, you pointed out that
19 the court had charged the Commission with seeking

20 whenever possible to safeguard and enhance the
21 profitability of tribal gaming. That's what the
22 Commission should be doing now.

148

1 The regulations as currently proposed
2 would unnecessarily delay play, limit design
3 options and generally undercut the opportunity
4 Congress intended when it authorized Class II
5 technologic aids. The NIGC should not
6 unnecessarily limit the tribes' right to use the
7 same technology available to the rest of the
8 country.

9 Thank you.

10 CHAIRMAN HOGEN: Thank you.

11 We've all discussed this before with me
12 doing most of the talking, maybe not enough

13 listening, but one of the things that's got stuck
14 in my head in connection with this is what came
15 out of some of the Mega Mania cases, that the
16 observation that the play of the game was really
17 outside the machine, the machines were just aids
18 to play, and that there was player participation
19 and that was permitted in this format that Mega
20 Mania permitted or utilized.

21 It seems to me that when you go back to
22 fundamental characteristics of the game, players

149

1 participating, that is, the success of the game
2 being dependent on the players participation, and
3 if you don't participate right, that is, if you
4 don't cover your number, you can lose.

5 Is there any significance to that? Am I
6 missing the boat when I think that you need to
7 build in some time in these games to permit some
8 real qualitative participation by the players?

9 MS. HOMER: I think personally, Mr.
10 Chairman, I think that players are participating
11 when they operate the equipment in the first
12 place. I think that player participation
13 involves the player engaging in the game.

14 I can understand why you may feel that
15 you need an element beyond that, so that it
16 satisfies your concern that there is a form of
17 participation, you know, more significant than,
18 you know, putting the coin in the machine and
19 pushing a button, but I'm not really sure the
20 player participation really needs to be any more
21 than that.

22 I don't know why it has to be any more

1 than that because you have people that are
2 consciously, volitionally, wilfully going to
3 these facilities to engage in these games, in the
4 play of these games. I think that that is
5 sufficient.

6 MR. WEBSTER: Mr. Chairman, I guess the
7 way that I often look at it is you're going back
8 to the language that the statute has. We're
9 talking about technologic aids and so the
10 question is, is the technology aiding the player,
11 and the technology can aid the player by
12 performing all sorts of functions, as long as it
13 doesn't cross the line into being a facsimile by
14 allowing that one player to play alone against
15 the machine rather than involving other players.

16 So, auto-daub which I know has been an
17 issue that we've talked about a lot, to me, what
18 is auto-daub? It's the device aiding the player

19 by covering the numbers for him as they're drawn
20 by the ball drawer or by the random number
21 generator. You know, that's clearly aiding the
22 player and that's okay, as long as you don't have

151

1 a self-contained game which isn't linked to
2 participating against the common ball draw with
3 other players where the player -- you know, where
4 his results are solely based upon that individual
5 unit and so that that's acceptable.

6 I guess, just to contrast it, you know,
7 there's been talk about what is a bingo
8 facsimile? To me, a bingo facsimile would be a
9 self-contained unit where there's a bingo card
10 and a ball draw and the player's results are
11 based solely upon what happens on that ball draw

12 on his card and I know that there used to be
13 games out there, and I think in some not Indian
14 markets, there still are bingo games that have
15 that look but they are not linked together. So,
16 in my view, those would be facsimiles. That's
17 what Congress was talking about, although perhaps
18 not in the most helpful language or the clearest
19 language.

20 MS. SHAPIRO: And I have to agree.

21 We've been practicing together too long, but to
22 say that the game is not in the machine is that

1 it's not in the box alone. It's not a player
2 playing only against the machine, and in all of
3 these games, there was a link network. There are

4 other players playing the game. The game is
5 something more than the sum of player and box.
6 It's not solipsistic play. It cannot be because
7 there always has to be another player. There
8 always is a network, and in that context,
9 broadening participation may not mean the number
10 of times that a player pushes a button.

11 Broadening participation may mean
12 reaching a critical mass of players across
13 geography limits. It may be able to do it in
14 times when there otherwise aren't enough people
15 in the room. It may even mean that you can have
16 one player in one room of a facility and another
17 player in another room that would not otherwise
18 be possible.

19 It enables games to be played more
20 readily with more people who might not otherwise
21 get in games and that is broadening
22 participation, so long again as they're not

1 playing only against the machine and that is what
2 Congress said you couldn't have and that's
3 sufficient.

4 CHAIRMAN HOGEN: I think you make valid
5 points, and I think that if IGRA only said you
6 can play bingo with electronic aids, then you
7 could have the machine do it all; that is, all
8 you'd have to do, as Liz said, is just show up,
9 put your money in, but they add to that
10 qualification but not a facsimile of an
11 electronic facsimile of a game of chance and so
12 that's a concern that I have, not to say that I
13 could never buy the scenario you folks have been
14 presenting, but it remains a concern, and any
15 additional, you know, logic, reason, whatever
16 that you could present us with as we try to deal
17 with that would be useful.

18 MS. SHAPIRO: I read one of the
19 transcripts of one of the consultations in which
20 you said that some of the commissioners believed
21 that it was okay to play a facsimile as Class II,
22 and I don't think any of us are saying that.

154

1 We all know the statute says you may not
2 play a facsimile. I think the difference among
3 all of us is what is a facsimile? Some of us
4 believe that a facsimile is a game which might
5 look like bingo or might look like pull tabs but
6 lacks the element of player competition and
7 therefore is a facsimile only and that's where we
8 think the line is drawn.

9 CHAIRMAN HOGEN: Well, I think as I read
10 this definition that we're thinking about

11 changing, it says something to the effect it
12 can't be a facsimile of the game of chance,
13 except for bingo, and then you can do it that
14 way. Now, maybe I will need to reread that, but
15 I think that's --

16 MS. HOMER: I would really like to
17 address that because, I mean, that was one of the
18 issues that, you know, we spent a great deal of
19 time tweaking and playing with, and I would
20 commend your attention because I know that we
21 don't have the time this afternoon, but to the
22 preamble, because we discussed at length why we

1 had taken that approach.

2 It was not that we were saying that you

3 could play bingo as a facsimile. We're saying
4 that there is a difference between a bingo aid
5 and a pull tab aid, and we had to craft a
6 distinction because our goal, and I don't know if
7 we've ever actually had this talk, but our goal
8 was to capture the state of the case law as it
9 was as of that date, and there was outstanding
10 case law with respect to the pull tab equipment
11 that said you must have a tangible medium.

12 We chose not to touch that case law one
13 way or the other. We didn't adopt it and say
14 yes, we didn't reject it either. We felt that in
15 the future, any kind of future case law or future
16 opinions by the NIGC could address those kinds of
17 issues.

18 I mean, so there are a couple of little
19 oddities perhaps in the way that the language was
20 framed, but it was clearly designed to capture
21 the law as it existed at that day without going
22 one step further or one step back and that's what

1 we tried to do.

2 But I think that it's very clear in the
3 way that we crafted the definitions that our
4 purpose was basically to alter the analytical
5 framework, so that you're not starting with the
6 question of whether you've got a facsimile, but
7 you start with the question of whether you have
8 an electronic aid, and you start the analysis by
9 saying what is the game we're playing here?

10 Is that game being aided by this
11 technology or have you crossed that line over and
12 become a prohibited facsimile that requires a
13 compact?

14 I think that the regulatory definitions
15 are very clear that you can't have a facsimile,
16 and I don't think there's any doubt in anybody's

17 mind, certainly it wasn't in our mind at the
18 time, that you cannot have a facsimile as a Class
19 II game, and I would again commend you to read
20 the preamble because we do discuss what we were
21 trying to do with the legal analysis by using the
22 language that we did, and let me just close by

157

1 saying that the way Joe stated it is exactly what
2 we intended.

3 You know, if you're playing bingo on a
4 stand-alone gambling device, you know, and it's
5 not linked, you're not playing the game with
6 other players, that would be a facsimile and
7 that's actually how we started doing the
8 analysis. What is the true distinction between a
9 facsimile and an aid? What is the true

10 distinction between Class II and Class III?
11 Class II are games that are played between
12 players. That's the bottom line difference and
13 that's what we tried to craft into those
14 definitions.

15 CHAIRMAN HOGEN: Okay. Thank you. I
16 know I'm eating into the public comment time, but
17 let me just make one further comment before we
18 turn it over to the public here.

19 Ms. Homer, you mentioned the duty of the
20 Commission and how we are supposed to be looking
21 out for Indians and looking out for tribes, and
22 my concern has always been that if we come to a

2 one can't distinguish what's being played as
3 Class II from Class III, that somebody, whether
4 it's the states, whether it's Congress or the
5 Justice Department, is going to come along and
6 say, hey, there's supposed to be a distinction
7 here. Who's supposed to be looking after this?
8 The person or the group that's supposed to be
9 looking after it is the National Indian Gaming
10 Commission, and we abdicate our responsibility if
11 we permit a drift in that direction where there
12 can't be a distinction, and if we let that day
13 come, I have grave concerns for the future of the
14 industry.

15 Having said that, we would ask if there
16 are any questions or comments that would like to
17 be put to the panel.

18 MR. PENNEY: Yes. Good afternoon,
19 Chairman Hogen, Vice Chairman.

20 My name is Sam Penney. I'm Vice
21 Chairman of the Nez Perce Tribal Executive
22 Committee. I've reviewed a lot of the documents

1 and in your opening comments, Mr. Chairman, you
2 said that the Department of Justice wouldn't be
3 participating in this forum, and we have a panel
4 of attorneys that represent tribes in this issue,
5 and I've always had a concern over the years, I
6 served about 10 years as chair of our tribe,
7 that, you know, when we have consultations or
8 public forums or something that's recorded, that
9 in my view, there's always a potential that these
10 hearings can actually in some ways be used
11 against us because I believe the Department of
12 Justice -- there should have been someone here to
13 explain their views or their stance on issues
14 because we have tribal attorneys doing just that,
15 and I'm just concerned that once this is all

16 done, hearing's over with, that I'm certain
17 Department of Justice is going to have access to
18 all these public comments that are being made
19 here this morning.

20 To me, that's a big disadvantage to the
21 tribes that are trying to protect their
22 interests, and I commend the attorneys for

160

1 sharing their views with us and that would be my
2 question, how they view the Department of Justice
3 not being here to state their views?

4 Thank you.

5 CHAIRMAN HOGEN: Any of the panel want
6 to comment on that?

7 MR. WEBSTER: Well, I'll just say
8 briefly, I think it is telling and it's something

9 that we're concerned about. I think it's
10 important to keep in mind that the Justice
11 Department opposed the passage of the IGRA in
12 1988. They have not been friendly to Indian
13 gaming from the beginning.

14 So, you know, they clearly opposed the
15 Commission's original regulatory proposal as
16 being too kind to the tribes and the Commission
17 has tried to address the Justice Department's
18 concerns. You know, frankly, we don't know
19 whether Justice would even be satisfied with the
20 proposal as drafted today which puts tribes in a
21 very, very difficult position.

22 MR. ANDERSON: I guess I'd respond and

1 ask the Chairman, is there a way to develop a
2 collaborative process as your regulations
3 enunciate with the Department of Justice as this
4 moves forward?

5 If there are new views that have not
6 been explained in your preamble or surfaced in
7 this hearing from the Department of Justice, is
8 there something that the tribes can be privy to?

9 CHAIRMAN HOGEN: Well, the Department of
10 Justice obviously isn't here and I certainly
11 appreciate Mr. Penney's comment, very well put,
12 and concern. There are lawyers that gave us that
13 legal advice and we don't tell them what to do.

14 But they haven't been totally silent on
15 this issue by any means. They've sent a proposal
16 to Capitol Hill that said let's carve out of the
17 prohibition against gambling devices in Indian
18 Country a place for those computers and
19 electronic and technologic aids for Class II and
20 let's direct the National Indian Gaming
21 Commission to draft regulations. So, I think,
22 you know, that's in and of itself a statement of

1 their position.

2 As mentioned earlier, they did consult
3 with respect to their original proposal. They
4 learned a lot. They changed it as a result of
5 that, and I think part of the reason they changed
6 it were things that we presented to them, NIGC,
7 but in terms of as we go down the road, how does
8 the federal family fit together and participate
9 in that, certainly something to consider, but the
10 fact that we have an attorney-client relationship
11 with them and we do have coordinating roles in
12 terms of we're regulators, they're federal
13 prosecutors, they have federal gaming statutes
14 that they are mandated to enforce, present some

15 issues that will have to be addressed.

16 Further questions?

17 MR. STRAUS: Mr. Chairman, I'd like to
18 address this question to you.

19 It's true, as you point out, that the
20 Justice Department would be your attorneys if
21 this got to court, but they also have their own
22 regulatory functions and they don't always do

163

1 what you want, witness the Santee Sioux case
2 where they proceeded independently to prosecute,
3 really prosecute the Santee -- it wasn't a
4 criminal proceeding but it might as well have
5 been -- the Santee Sioux Tribe, even though the
6 tribe was acting on the specific advice of the
7 chair of the NIGC.

8 So, I'd like to ask you the direct
9 question. Has the Department of Justice signed
10 off on the latest draft of the regulations?

11 CHAIRMAN HOGEN: No, they have not.
12 That is, they haven't said we approve all of this
13 and they haven't said we disapprove all of this.
14 They did, you know, express a concern when we
15 were ready to go to the Federal Register a year
16 ago this spring about the approach that we took.
17 After that, this whole business about an
18 amendment to the Johnson Act came about and I
19 view that favorably, but I don't know, you know,
20 when push comes to shove, you know, what they
21 will say in this connection.

22 MR. STRAUS: So, even if these

1 regulations are final and somehow the tribes
2 learn to live with them, tribes would still not
3 be assured at this point that they did not face
4 proceedings by the NIGC to close them down -- by
5 the Department of Justice to close them down at
6 this point?

7 CHAIRMAN HOGEN: I think they'll be on
8 much better ground than the Santee Sioux were
9 just having the advice of the chief of staff of
10 the National Indian Gaming Commission in that
11 they would have some very fully vetted adopted
12 regulations.

13 MR. STRAUS: But on the Johnson Act
14 issue itself, which is a crucial one, these
15 regulations don't cure that concern, don't take
16 care of that. So that's still an open issue.

17 CHAIRMAN HOGEN: I think that remains an
18 open issue, yes.

19 MR. STRAUS: Thank you.

20 MR. YANITY: Shawn Yanity, Stillaguamish
21 Tribe. We believe in the reclassification issue

22 surrounding Class II gaming is a serious

165

1 political concern. There are states within the
2 union that have not entered into Class III
3 compact negotiations with the tribes within its
4 boundaries for whatever reason.

5 As we understand it, this becomes an
6 issue because Seminole Tribe v. Florida does not
7 necessarily guarantee good faith or sovereign
8 immunity in Class III compact negotiations, an
9 11th Amendment issue.

10 In the State of Washington, Class II
11 gaming is the only leverage the tribe holds
12 against the state government increasingly
13 interested in revenue sharing.

14 With the addition of several tribal
15 casinos in the next two years, there will not be
16 enough license to ensure the economic viability
17 of these tribal enterprises. Those facilities
18 will have to pursue the Class II alternative to
19 fund their tribal programs.

20 Tribal governments are the largest
21 employer in many of the areas that would be
22 affected by these changes. The NIGC's proposed

1 rule will result in the loss of jobs at Class II
2 facilities. This means that tens of thousands of
3 American jobs will be lost to areas of the
4 country that can least afford it.

5 The Stillaguamish Tribe employs the
6 majority of its membership in tribal enterprises

7 other than its casino. We do, however, employ
8 Natives from 20 tribes other than the
9 Stillaguamish. With the loss of these machines
10 in regard to revenue generation, we will have to
11 eliminate jobs within our facility.

12 The unemployment will have a cascading
13 effect on those tribes whose members we employ,
14 some of which do not have facilities of their own
15 to employ their membership.

16 Thank you.

17 CHAIRMAN HOGEN: Thank you. Tracy
18 Burris?

19 MR. BURRIS: Mr. Chairman, thank you
20 very much, and I'll try to be quick, but as I
21 always said to you and I said this in these
22 deals, the more I listen to you and every time we

1 come back, I realize you keep learning something
2 in the process and that's a good thing because
3 your question to them awhile ago, when you were
4 talking about that fundamental characteristics,
5 you know I'm an old bingo man, and, you know, we
6 talk about the point of sales.

7 You go in, you make a choice whether
8 you're going to do it or not. Then you get to
9 the machine, you choose what level you want to
10 play in. They choose that when they buy in.
11 They get to choose their cards. Before, we
12 didn't give them that choice because we
13 controlled the game in the regular bingo card,
14 because what changes that some is when you change
15 the cards when they choose.

16 Now you have to put enough out there and
17 calculate the math. The daub to play, not
18 opposed to that. It's a question of how soon and
19 how far in between. We know that exists.
20 Patterns. Patterns help choose the levels they

21 play. The truth of it is, they can choose a game
22 by the patterns by which they can win on. Some

168

1 would say that correlates to symbols. Fair
2 enough. It is.
3 The old bingo, they daub again. You
4 sleep it, that's just a fiduciary rule that we've
5 always made to speed the process up. So, it's
6 all there, but the essence of what you're saying
7 is, the question is if you take the old bingo
8 king catalog and you flip through it and you look
9 at the patterns, the bingo cards, the choices of
10 patterns, the colors, all the things, the
11 decisions that managers make to make a game exist
12 and you look at the equipment.

13 There is not a disparity in between that
14 if someone takes the time to look, but flash
15 through it quickly instead of one page at a time
16 and see what the effect is and that would help, I
17 think, in this process because you can read it
18 one page at a time or you can flash through it
19 because time is moving fairly quickly and that
20 seems to be a key issue here, is time.

21 So, as we all have learned this, I was
22 not in Oklahoma, I was not one of the first

169

1 tribes to put the machines in. I was a year and
2 a half behind everyone else because it took me
3 that long to decide it was the right thing for my
4 tribe to do, and I constantly and consistently
5 have been looking at this process.

6 The Commission originally brought up the
7 game classification process and really talked
8 about it in '97. We started the process in '98,
9 got held up and now it's reiterated under this
10 new term that you're on here.

11 So, I commend you for that. As a
12 regulator, I think it's important, and I'll leave
13 it at that, and I got two more deals.

14 From the last panel, the difference
15 between a slot machine and bingo is tremendously
16 different. If we all had slot machines,
17 compacted for them, it would be a real simple
18 issue. We wouldn't be having this conversation.
19 A slot machine is a slot machine. It's a
20 mechanical reel. We all, if we studied that, and
21 I've went to great links to learn this, to study
22 that, what a slot machine is and what we're doing

1 here. By God, give me the slot machine because
2 it's a heck of a lot easier. I could end my
3 days, do everything I do 10 times easier.
4 Operationalwise, I wouldn't have half the staff I
5 needed to do this. There's a lot of things I
6 could do easier if I had those.

7 Unfortunately, I don't. So, we work
8 with what we have and we use that technology to
9 help us move that, and the other is on those
10 people, which should be said, states have a stake
11 in it now more than ever after 20 years of
12 whether or not they -- what makes it equal is
13 whether it's non-revenue or revenue compact. So,
14 those are important issues that drives even the
15 policymakers for the states, too.

16 So, thank you very much.

17 CHAIRMAN HOGEN: Thank you. Okay. We
18 have less than -- okay. One more comment or
19 question before we go to lunch.

20 MR. REID: Thank you very much. You
21 know, I didn't get to speak last time on the
22 other panel here, but I was noting and some of

171

1 the other ones were, too, the intent of, say, not
2 a hammer and that was by Congress making that in
3 that report.

4 I'll just make a statement here.
5 Congress, history and interest, concern for
6 Indian people, have always been a trust
7 relationship between Congress and tribes to
8 always see to self-sufficiency, economic
9 development and stronger governments, as the
10 report that accompanied the IGRA reveals on the
11 concerns that modern technology maximizes player

12 participation of tribal economic development.

13 I think that was left in there because
14 of the fact that they knew that there were states
15 that weren't going to allow participation of
16 gaming in the Class III and that Class II was
17 something that tribes could use.

18 I'm not a mindreader, but I'm sure that
19 Congress has always had the interest of the
20 Indian tribes in developing their stronger
21 government and self-sufficiency. So, I'd just
22 like to say that I don't think that they did

172

1 leave that for purpose.

2 Thank you very much.

3 CHAIRMAN HOGEN: Thank you. Certainly

4 Class II is extremely significant and for a lot

5 of reasons, and we can never lose sight of that.

6 Okay. Thank you very much, panel. We
7 appreciate your view. We might send you some
8 questions, which we would hope you might respond
9 to to help us in this process.

10 We will adjourn until 1:55. You can go
11 through security and go down to the cafeteria or
12 the snack bars and hopefully we'll all be back
13 here in time to start the Manufacturers Panel.

14 Thank you. We're in adjournment.

15 (Whereupon, at 1:05 p.m., the public
16 hearing was recessed, to reconvene at 1:55 p.m.)

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20 AFTERNOON SESSION

21 (2:00 p.m.)

22 CHAIRMAN HOGEN: Good afternoon and

1 welcome to the Manufacturers Panel. We are going
2 to proceed following the format we followed this
3 morning; that is, each of the presenters will
4 summarize their remarks, hopefully in five
5 minutes, and then we will entertain questions
6 both from the Commission and comments from the
7 public and conclude the panel.

8 Certainly we couldn't have the gaming we
9 have today if it were not for the folks who
10 design and build and market the equipment that's
11 necessary to make that work and certainly it is a
12 vast, very complex proposition to come up with
13 this equipment that can be secure, pay off, and
14 be regulated.

15 But this afternoon, we have from
16 International Game Technology Knute Knudson, Jr.
17 We have from Bally Technology Mark Lerner,
18 General Counsel. We have Gary Loebig from Multi-

19 Media Games. We have Ron Harris, President and
20 CEO of Rocket Gaming Systems, and from Planet
21 Bingo, we have Eric Casey.
22 So, we are ready to commence, and we'll

174

1 start with Knute Knudson.

2 Panel 4 - Manufacturers

3 MR. KNUDSON: Thank you, Mr. Chairman,
4 Commissioner Choney. Thanks for the opportunity
5 to address this hearing today.

6 If I may incorporate the written
7 information IGT has and will submit by reference
8 today or at least note that my testimony is not
9 inclusive of all of IGT's objections to these
10 proposed regulations, so that I can then focus on

11 my testimony on our most grave concerns with the
12 proposed regulations.

13 Directly and through Sodak Gaming, IGT
14 has provided gaming devices that help tribes
15 realize IGRA's goals to promote tribal economic
16 development, self-sufficiency, and strong tribal
17 governments since IGRA's inception.

18 Our concern with the proposed
19 regulations are twofold. We are concerned that,
20 Number 1, the proposed regulations are designed
21 to cure a problem that does not exist and, Number
22 2, that these proposed regulations will result in

1 substantial economic harm to tribes and to tribal
2 programs that assist tribal members.

3 The Commission's concern that Class II

4 games be distinguished from Class III games has
5 driven much of the proposed regulation, yet the
6 objective evidence leads inescapably to the
7 conclusion that the distinction between Class II
8 game of bingo played with an electronic aid and a
9 Class III game is quite clear today.

10 Despite its egregious offense to
11 sovereignty, tribes today will pay as much as 25
12 percent of their slot revenue to states pursuant
13 to negotiated revenue-sharing agreements to offer
14 Class III slot machines to their customers rather
15 than offer Class II games with electronic aids.

16 This, despite the fact that Class II
17 games require no revenue-sharing payments. Why?
18 Because even with the most advanced Class II
19 equipment aids, the player, the customer, can
20 easily detect the difference between a Class II
21 game and a Class III game.

22 The proposed regulations will not serve

1 to distinguish one class of games from another as
2 that distinction already exists today. However,
3 the proposed regulations will serve to damage the
4 playability of the games and so damage tribal
5 revenues.

6 The proposed regulations seek to burden
7 the Class II games and aids to the play of Class
8 II games in ways that make the game no more Class
9 II than an unburdened game. The regulations do
10 make the game less appealing to the player and
11 more difficult and less profitable to offer by
12 the tribal operator.

13 These regulatory burdens to which we
14 object to most strongly are: (a) daubing
15 requirements, auto-daub and mandated time to
16 daub. We submit that neither auto-daub more a
17 two-second minimum wait, even when all players

18 have completed direct daubing during daubing, are
19 required for the play of bingo.
20 (b) ball release restrictions. New
21 ball release restrictions add significantly to
22 game time but do not increase a game's quality as

177

1 bingo.
2 (c) pays, patterns and probabilities.
3 We object to exclusion of the traditional option
4 of a player to purchase a chance to win
5 additional bonus prizes based on patterns that
6 are not central to the game. This prohibition
7 does not increase a game's nature as the game of
8 bingo.
9 Game start restrictions. Requirements

10 for more than two players or additional time for
11 a game start make a game no more bingo but such a
12 game is less appealing to the player and is less
13 efficient for the tribal operator.

14 Damage to tribal revenue potential.

15 With the burdens I note above, we estimate it
16 will take as much as 13 seconds to play a single
17 Class II game of bingo with an electronic aid.
18 This will double or even triple game time
19 compared to games offered today. Such an
20 increase in game time is devastating in its
21 negative effect on tribal gaming operations. It
22 will reduce gaming revenue for Class II

1 operations by 40 to 70 percent. It will reduce
2 Class II tribal gaming revenue nationwide by as

3 much as \$1 to \$3.4 billion.

4 IGT is concerned that the proposed
5 certification system would fatally burden the
6 future of Class II gaming. If certification is
7 required, as proposed, manufacturers have few
8 protections: either substantive or procedural.
9 Proprietary information is at risk. Delays are
10 certain to impede certification. Manufacturers
11 standing to appeal negative determination is in
12 doubt, but even more, the Commission proposal
13 provides minimal opportunity for any challenge to
14 an independent laboratory, except for NIGC's
15 chair own ability to object to the findings and
16 with few limitations on the time or content.

17 A clear distinction exists today between
18 Class II electronic aids and Class III gaming
19 devices. Implementing the regulations you
20 propose to make the game less appealing to the
21 player and less valuable to the tribe will only
22 serve to hurt the interests of tribes.

1 I urge you and the Commission in the
2 strongest possible terms to withdraw and
3 reconsider the effect of these proposed
4 regulations.

5 CHAIRMAN HOGEN: Okay. Thank you, Mr.
6 Knudson. Mr. Lerner?

7 MR. LERNER: Thank you, Mr. Chairman,
8 Commissioner. Thank you for the opportunity to
9 be here today and the invitation. It's very much
10 appreciated.

11 I'm Mark Lerner. I'm Senior Vice
12 President and General Counsel for Bally
13 Technologies. Bally has been a leader in the
14 gaming industry for 75 years now. We have
15 developed many of the innovations that are now
16 common in the industry, and as most people know,

17 in 2004, we acquired Sierra Design Group which
18 was a leader, a developer of Class II and Central
19 Determination Video Lottery Games and a pioneer
20 in that field.

21 Since that time, we've continued to
22 develop and provide to our tribal gaming

180

1 customers Class II games that are both legal and
2 commercially successful. We've invested millions
3 of dollars in our Class II products, so we
4 currently support thousands of Class II
5 electronic devices spread across dozens of tribal
6 gaming facilities.

7 In developing our Class II games, we
8 have two paramount concerns. One, that they be

9 legal, and two, that they be commercially
10 successful. A game that is legal but a
11 commercial failure is not any good to us or to
12 our customers. Similarly, as a game vendor
13 licensed in scores of jurisdictions around the
14 country and the world, we simply cannot provide
15 games that fail to meet the legal requirements of
16 the applicable regulations.

17 In our view, Congress clearly intended
18 that tribes make money with Class II gaming. In
19 fact, the first stated purpose of the Act is to
20 provide a statutory basis for the operation of
21 gaming by Indian tribes as a means of promoting
22 tribal economic development, self-sufficiency,

1 and strong tribal governments.

2 It's also our view that Congress
3 provided a bright line test to distinguish
4 electronically-aided Class II games from Class
5 III games. As explained in the legislative
6 history, a Class II game can be played with
7 electronic aids as long as the aids do not make
8 the game into a facsimile by permitting a single
9 player to play a game against a machine rather
10 than against other players, and I know that the
11 previous panels have belabored this point at
12 length and so I won't go much further than that.

13 I know that you and I, Mr. Chairman,
14 were on a panel not too long ago where we agreed
15 to disagree on this particular point, and I would
16 just say that maybe it's the perspectives, the
17 point of view that we come at it from.

18 I come at it from beginning in the
19 casino industry and looking at it from games that
20 are clearly casino games and I see a Class II
21 game and I'll tell you, I can tell the difference
22 instantly. It doesn't take a lot of time or

1 factfinding.

2 A game that meets the statutory
3 requirements for bingo may be played using
4 electronic aids but only if it doesn't permit a
5 player to play against the machine and this is
6 the bright line as to what is permitted, and at
7 the same time, it gives us the flexibility that
8 we need to build and develop exciting games that
9 are commercially successful.

10 We believe that the classification
11 regulations proposed by the Commission would
12 muddy this clear line by imposing numerous
13 onerous restrictions on both the underlying games
14 and the types of electronic aids used to play
15 those games. The games that would be permitted

16 would be slow, hard to play, and generally
17 unappealing, and they would be limited to a very
18 narrow range of games that would have very little
19 commercial viability.

20 We believe that the games that would be
21 permitted under the proposed regulations would
22 generate something less than half of what the

1 current games do.

2 There are other proposed problems with
3 the proposed standards. They are so stringent
4 that it may not be possible from a commercial
5 standpoint to build a game that is compliant.

6 While we strongly support the idea of Class II
7 technical standards, the standards need to be

8 reasonably based on current technology and the
9 economics of the games, and we will submit
10 comments in more particular on that as we go
11 along here.

12 I'd also like to point out that on a
13 previous panel, someone was asking how many games
14 are out there that do comply with the regs as
15 proposed, and there was some speculation there
16 might be some, there might be a few, there might
17 be many, there might be none. I don't know of
18 any, and I don't think that we know of any that
19 comply with this, and we would have to re-
20 engineer these games.

21 This is a new type of bingo. This isn't
22 any kind of bingo that's out there now and so I

1 don't know how this fits in with the definition
2 of a game commonly known as bingo, but it's hard
3 to make a case that these regulations cover that
4 field.

5 It's hard to make a business case for us
6 to stay in the market because we have to develop
7 -- it's very costly to develop games, especially
8 if they generate less revenue than the current
9 ones. We have significant concerns about linking
10 our name to a game that is unlikely to be
11 accepted. We like to build successful products,
12 not unsuccessful ones.

13 We have also concerns that our ability
14 to provide games under a regulatory framework
15 where the Commission has reserved the right to
16 revoke the game certifications on an unlimited
17 basis for an unlimited length of time. This
18 would be an enormous risk for both us and the
19 tribes to assume, another point that's been
20 raised by previous panelists.

21 Thus, we're left with the unfortunate

1 are likely to destroy the commercial viability of
2 Class II gaming which will hurt everybody, the
3 tribes, us, and force us to reconsider whether to
4 stay in the market or not, and I would echo Mr.
5 Knudson's request and urge the Commission to
6 withdraw the current proposed classification
7 regulations and take a fresh look at the issue
8 after completing work on the technical standards
9 regulations.

10 CHAIRMAN HOGEN: Thank you. Mr. Loebig?

11 MR. LOEBIG: Chairman Hogen,
12 Commissioner Choney, guests and staff.

13 I am Executive Vice President of Multi-
14 Media Games, and today I'm substituting for the

15 CEO of Multi-Media Games Clifton Lind who had a
16 death in his family on Sunday.
17 I would like to thank you for inviting
18 us to comment today on the proposed Class II
19 definitions and classification standards. These
20 definitions will have a far-reaching impact on
21 how Class II games can be designed and played and
22 on the economic development that they foster for

186

1 the tribes.

2 My 23 years of experience in the bingo
3 industry and product and market development began
4 more than four years before the IGRA was passed.
5 Subsequently, I've continued to work in the
6 industry, first for Bingo King, and for the last

7 seven years with Multi-Media Games.

8 During that time, I have been involved
9 in assisting state and tribal governments with
10 legislation, rule-writing and regulatory training
11 in the Indian Country and charity markets.

12 Many of the products I have worked on
13 you may be familiar with. They include precall
14 Bonanza Bingo, Bonus Line Bingo, and System 12,
15 an electronically-assisted bingo system. These
16 products represent the adaptation of the
17 advancement in technology to the prevailing rules
18 in order to allow users of the technology,
19 charities and tribes, to take advantage of the
20 technology for their economic benefit, much the
21 same as the IGRA was designed.

22 The risk in writing rules which address

1 technology lies in the fact that the benefit of
2 the innovations can be restricted and possibly
3 eliminated. I do not know of any Class II
4 electronic bingo product which currently conforms
5 to the proposed classification criteria. This is
6 a very expensive and time-consuming process,
7 probably more time-consuming than the Commission
8 appreciates.

9 Additionally, a decline in the number of
10 tribes conducting Class II gaming is probable.
11 This decline is predicated on the supposition
12 that new Class II games which meet the proposed
13 classification criteria generate appreciably less
14 revenue than those Class II games currently
15 approved by the NIGC. This results in the tribes
16 who have Class II gaming alternatives selecting
17 those alternatives.

18 With the introduction of compacted games
19 in Oklahoma and with slot machines being
20 introduced into Florida racetracks, thereby

21 putting pressure on the state and the Florida
22 tribes to eventually compact, there are only four

188

1 states with IGRA tribes where the tribes have no
2 alternative, where they are forced to conduct
3 only Class II games, that being Alabama, Alaska,
4 Nebraska, and Texas.

5 The combined number of Class II units
6 operated by these Class II captive tribes is
7 estimated to be between 3 and 4,000 units. A
8 market of this size will support a limited number
9 of vendors. The tribes may experience less
10 variety and less competitive prices. The
11 viability of the Class II games is undoubtedly
12 the most important factor as to whether tribes
13 move to Class III and vendors leave the market

14 segment.

15 Multi-Media Games has been developing
16 Class II games since the year IGRA passed. It
17 has provided the game at each stage of the
18 advance in technology. Along with its tribal
19 partners, it has seen the economic impacts of
20 revenue growth at each stage in the form of net
21 revenue receipt per day.

22 In 1989, Mega Bingo, Multi-Media's

189

1 satellite-delivered paper bingo game, increased
2 the net revenue of a paper bingo sheet earning
3 \$16 per night by an additional 11.68 percent. In
4 1998, Mega Mania increased the daily net revenue
5 of that equivalent paper bingo sheet by 3.75

6 times. With the introduction of real-time bingo,
7 that sheet's daily net revenue increased roughly
8 by 7.5 times.

9 The approved 2.0 version of real-time
10 bingo introduced in 2003 reduced the daily net
11 revenue increase to about 4.7 times of that bingo
12 sheet and finally, a second modified version of
13 the real-time bingo, 2.0, approved in 2005, that
14 more closely approximates the proposed rules,
15 reduced the daily net revenue increase of that
16 equivalent bingo sheet to 1.3 times.

17 Stating it another way, if the paper
18 bingo sheet's net revenue amounted to \$10, then
19 Mega Bingo would have increased the sheet's net
20 revenue to 11.68. Mega Mania would have
21 increased the net revenue to \$37.50. Real-time
22 bingo 1.2 would have increased it to \$75. Real-

1 time bingo 2.0 would have reduced it to \$47 and
2 the latest approved real-time bingo version would
3 have reduced the net revenue of an equivalent
4 bingo sheet to \$13.

5 To further illustrate the impact in this
6 example, if you use the 20,000+ Class II machines
7 estimated to be in Oklahoma in calendar year
8 2003, by the Indian Gaming Industry Report 2004-
9 2005 Edition, and use that as a base number of
10 the affected units, then the difference between
11 the Class II game approved in 2003 and the
12 modified Class II game approved in 2005 amounts
13 to 248 million in net revenue and to 4.9 billion
14 in gross revenue, just on those 20,000 units.

15 In short, if, among other things, a game
16 does not appeal to a player because flexibility
17 in the price structure is limited, the game
18 mechanics are difficult for the player to
19 understand, and the game plan flow is not

20 intuitive, then the players will not play except

21 as a last resort of sorts.

22 It is not a truism that if it is the

191

1 only game in town, people will play. Similarly,

2 it is not a truism that a tribe can achieve its

3 economic development goals through the

4 implementation of just any form of Class II

5 gaming.

6 Thank you.

7 CHAIRMAN HOGEN: Thank you. Mr. Harris?

8 MR. HARRIS: If that wasn't depressing

9 enough, I'll take my turn.

10 Good afternoon. My name is Ron Harris.

11 I am the Chief Executive Officer of Rocket Gaming

12 Systems, which is a commercial enterprise in the

13 Miami Tribe of Oklahoma Business. We provide
14 thousands of Class II games to more than 80
15 tribal gaming facilities located in 12 states.
16 After working on the Mega Mania project
17 with Multi-Media Games, I moved on as one of the
18 original founders of Rocket Bingo in September of
19 1996. As a side note, I will tell you we did
20 celebrate our 10th birthday yesterday, and I will
21 also tell you I think those were all in dog
22 years. This is a tough business.

192

1 We developed a game in 1996 called
2 Rocket Ante-Up Bingo. Rocket Ante-Up, like Mega
3 Mania, was based on a game called Lightening
4 Bingo. We had tried to market Rocket Ante-Up to

5 Indian gaming facilities, but we were repeatedly
6 told by gaming commissioners that we had to get a
7 Class II letter, like Mega Mania's, before we
8 could be played in their gaming facilities.

9 We therefore had to request a
10 classification letter from the NIGC. By this
11 time, the Department of Justice had already
12 expressed its disagreement with Mega Mania's
13 Class II classification. We were instructed by
14 the NIGC to meet with the DOJ, U.S. Attorney
15 Stephen Lewis in the Northern District of
16 Oklahoma to seek an advisory opinion that Rocket
17 Ante-Up was Class II and that if we were
18 successful, the NIGC would issue a similar Class
19 II opinion within 48 hours.

20 Our first meeting with U.S. Attorney
21 Lewis began and ended with the statement that it
22 was the position of the DOJ that if it plugs into

1 the wall, it's a slot machine. After many
2 meetings with the DOJ and much behind the scenes
3 help from the NIGC, we were issued a historic
4 written opinion from the Department of Justice in
5 July of 1997 that a game called Rocket Classics
6 Bingo was in fact a Class II game. It was the
7 first letter and I have been told by others it
8 will be the last letter ever written by the DOJ.

9 The NIGC shortly issued classification
10 opinions on Rocket Classics as well as Rocket
11 Ante-Up that they were Class II games as well.

12 Several years later, I was told by Mr.
13 Lewis, who was the U.S. Attorney for the Northern
14 District, that DOJ issued the Rocket Classics
15 letter for three reasons. The first reason: the
16 DOJ didn't think we could build it. Secondly:
17 if we built it, it wouldn't be any fun. Thirdly:
18 if it were fun, the DOJ didn't think we could

19 make any money with it.

20 Thankfully, the DOJ was wrong on all
21 three accounts, and I might add, thankfully, the
22 DOJ has not sued us for any royalty payments for

194

1 helping and assisting such a successful game
2 design.

3 I'm stating my recollection of these
4 events not to find fault with anyone or any
5 particular agency. I state them in an attempt to
6 add a bit of historical perspective to the events
7 that have spanned more than a decade and have
8 contributed to reasons why we are sitting in this
9 historic meeting.

10 During my work over the last 11+ years,
11 I have talked to many tribal leaders who tell of

12 an even more historic journey that seems to be
13 forgotten, the battles fought, and the
14 negotiations that led to the 1988 Indian Gaming
15 Regulatory Act to begin with. Those efforts led
16 to what most tribes believe is a very clear
17 definition of bingo.

18 If Congress had attempted in 1988 to
19 further define bingo beyond the three statutory
20 requirements, such as imposing limitations on the
21 value of the game-winning prize, the size of the
22 ball draw, the size of the bingo card, the number

1 of release of bingo ball numbers, the size of
2 each bingo number release, the time period of the
3 release, and the number and length of each daub,

4 I would dare speculate that IGRA would not have
5 made it to the Floor for a vote. Yet, these
6 limitations are all found in the proposed
7 classification regulations.

8 The three statutory requirements of the
9 Act offer a very bright line to differentiate
10 between the game of bingo from a slot machine. I
11 think the other three manufacturers here have
12 done a much better job than I of describing that.
13 There are radical differences in design and
14 operation of a bingo game versus a pure simple
15 slot machine.

16 I'm here to testify that the Act's three
17 statutory requirements result in a bingo game
18 that is dramatically different in design and
19 operation than that of a slot machine and
20 provides a very bright line for those
21 manufacturers that abide by those three statutes.

22 It's my opinion as a manufacturer that

1 the proposed classification standards as
2 published will not allow the development of a
3 commercially-viable product. The regulation as
4 published will effectively fulfill the original
5 intent of the DOJ.

6 Number 1. I don't think we can build
7 it.

8 Number 2. If we build it, I'm not sure
9 it will be fun.

10 Number 3. If it happens to be fun, I
11 don't think any of us are going to make any money
12 with it.

13 I can assure the Commission that bingo
14 games that would be developed in accordance with
15 the proposed standards will be so extraordinarily
16 expensive to produce and maintain and would be so
17 unique that they wouldn't be found in any paper

18 hall anywhere in the world.

19 Unless the regulations are revised, the
20 result would be devastating to tribes that rely
21 on Class II gaming to generate revenue for tribal
22 government programs, tribes that need Class II as

197

1 a viable fallback position to existing state
2 compacts and to small vendors, such as Rocket.
3 Moreover, they are likely to lead to years of
4 litigation.

5 We recommend that the Commission
6 withdraw the current proposed classification
7 regulations. Instead, we hope the Commission
8 will continue to work with the tribes and vendors
9 to develop reasonable technical standards which
10 could aid both tribes and vendors.

11 I sincerely thank Chairman Hogen and the
12 rest of the NIGC staff for holding this historic
13 meeting. I truly believe the Chairman and the
14 NIGC staff are interested in acting in the best
15 interests of all Indian tribes and I commend them
16 in this regard.

17 Without such thoughtful deliberation and
18 consideration, however, I fear that, along with
19 further tribal sovereignty erosion, thousands of
20 jobs and hundreds of millions of dollars in
21 investment capital will be lost.

22 Thank you.

1 CHAIRMAN HOGEN: Thank you. Mr. Casey?

2 MR. CASEY: Thank you, Mr. Chairman,

3 Vice Chairman Choney, and ladies and gentlemen of
4 the audience.

5 My name is Eric Casey, and I represent
6 Planet Bingo. I also represent 16 years of
7 manufacturing service to the Session Bingo
8 Operators in Indian Country and beyond.

9 I've had the good fortune to be on hand
10 as well as some of the earliest electronic bingo
11 devices made their way into what at the time was
12 a purely paper bingo marketplace, and as the
13 proposed classification standards focus on bingo
14 played in an exclusively electronic medium, I'd
15 like to begin my discussion by pointing out that
16 across nearly 100 years of American bingo
17 history, the game of bingo has transmigrated
18 through numerous mediums, beginning with beans on
19 hard cards and progressing into shutter cards,
20 then into newsprint bingo cards and daubers and
21 now into electronic cards.

22 At each progressive level of technology,

1 we have seen enhancement to the game of bingo by
2 speeding up the game play, by allowing players to
3 play more cards faster, and by adding the
4 possibility of new entertainment values with the
5 introduction of game attributes, like wild
6 numbers and bonus prizes, but all the while,
7 throughout that history, we have maintained the
8 core attributes that have set the game of bingo
9 apart from other games of chance: multiple
10 players and a common game and a winner every
11 time.

12 In 1988, the IGRA distilled these core
13 attributes into the three statutory criteria that
14 identify Class II bingo and these criteria hold
15 up no matter what medium the game is played in.
16 They are as appropriate to hard cards as they are

17 to electronic bingo devices.

18 Furthermore, the IGRA accommodates the

19 continuing evolution of industry toward

20 information age products, stating "the game of

21 chance, commonly known as bingo, whether or not

22 electronic, computer or other technologic aids

200

1 are used in connection therewith, clearly

2 separates the game of bingo from the medium

3 through which it is played," and this is just as

4 important a distinction as that which is drawn

5 between an aid and a facsimile.

6 The IGRA defined the criteria by which

7 bingo is bingo and it placed no restrictions on

8 the mediums through which the game was played as

9 long as the game itself wasn't replaced with an

10 electronic or electromechanical facsimile of a
11 game of chance.

12 This distinction between an electronic
13 aid and an electronic facsimile is well iterated
14 in the 2002 revision to 25 CFR Part 502.8 as it
15 currently stands, while the proposed change in
16 this definition throws the entire electronic
17 bingo medium into the realm of facsimile and
18 forces it to fight its way out.

19 The proposed language calls a facsimile
20 any electronic or electromechanical format that
21 replicates a game of chance by incorporating all
22 of the fundamental characteristics of the game,

2 are the very same criteria spelled out in the
3 IGRA to define Class II bingo. So, this proposed
4 revision to 502.8 presents a very unsatisfying
5 conundrum, to say the least.

6 This leads to another troublesome area
7 in the proposed classification standards. The
8 draft states that it is not, "not" the
9 Commission's intent to prescribe rules for how a
10 tribal gaming operation conducts its live session
11 bingo. The exception to this general approach is
12 when a tribal gaming operation conducts its live
13 session bingo exclusively through network player
14 stations or when these devices essentially
15 perform all the functions of bingo play normally
16 undertaken by the players.

17 The Commission here is attempting to set
18 up two different types of bingo: live session
19 bingo and bingo played exclusively through an
20 electronic medium, and the Commission proposes to
21 prescribe rules governing the latter at the
22 expense of the entire electronic medium itself.

1 I don't think it's viable to separate
2 live session bingo from bingo played on Class II
3 machines to begin with because if it's Class II
4 bingo under the IGRA, it's Class II bingo. It's
5 all live session bingo. It's either bingo under
6 IGRA or it's not.

7 So, why should the electronic medium be
8 separated and limited and restricted,
9 parameterized if the bingo game that's being
10 played in conjunction or in connection with the
11 medium of electronic aids meets all of the
12 statutory criteria of a Class II game under the
13 IGRA?

14 Shouldn't the focus be on ensuring that
15 the IGRA Class II criteria are being upheld and

16 the game's being played with the technologic aids
17 and not on how fast the balls are called or how
18 big the cards are or what the display looks like
19 on these aids?

20 I'm compelled to note that while it's
21 the Commission's stated intent not to prescribe
22 rules for how a tribal gaming operation conducts

203

1 its live session bingo, that's exactly what the
2 Commission is doing in trying to classify bingo
3 played in an exclusively electronic bingo medium
4 as somehow separate from live session bingo.
5 They are one and the same.

6 As a final note to this presentation and
7 speaking on behalf of live session bingo
8 everywhere, I would like to comment on the stand

9 the Commission is taking against the use of

10 predrawn numbers specifically.

11 Predrawn numbers are very common in a

12 popular game called Bonanza Bingo. The

13 Commission states that it believes predrawn

14 numbers are "an anathema" to games similar to

15 bingo. I had to look up anathema in Miriam

16 Webster's Dictionary and it reads, "Anathema.

17 From the Greek. A thing devoted to evil, a

18 curse, someone or something intensely disliked or

19 loathed."

20 That's pretty hard, but my point is

21 this. The use of predrawn numbers in games of

22 bingo has been around in the bingo marketplace

1 since long before the Commission was conceived or
2 the IGRA was enacted and this position against
3 predrawn numbers seems somewhat subjective and
4 perhaps worthy of significant reconsideration.

5 To wrap up with regards to the proposed
6 classification standards and Rule 25 CFR Parts
7 502 and 546, I believe these standards, if
8 passed, will leave the tribes and the industry
9 with a legacy of severely and unnecessarily
10 restricted innovation which will have a lasting
11 negative impact on the evolution and
12 sustainability of Class II gaming itself.

13 I think that better solutions to the
14 Class II/Class III product distinction challenge
15 are available to us and I would urge the
16 Commission and the industry to at the very least
17 stop and take a deep breath and start again
18 building on all of the dialogue and interaction
19 of the past three years.

20 Thank you, gentlemen.

21 CHAIRMAN HOGEN: Thank you very much.

22 Are there comments from the public or questions

1 for our panel or the Commission in this area?

2 MR. PARKER: Gentlemen, my tribe has a

3 couple of points to this, the first one being

4 who's going to pay for this?

5 This esteemed panel that sits up on the

6 table right there, they're business men. Our

7 tribe tried to do the responsible thing and

8 that's purchase their Class II machines. That

9 means we accept the burden or have to accept the

10 burden of the changes that you guys are putting

11 out monetarily.

12 Now we followed all of your

13 classification standards. We did everything that

14 we were supposed to do as a tribe and yet you

15 changed the rules on us. Now who's going to pay
16 for it?
17 These folks up here, a lot of them have
18 red share programs. Are they supposed to pick up
19 the cost of all of these changes? Not one of
20 them mentioned it, and I have to commend you for
21 that, but that's the elephant that's in the room
22 as far as I'm concerned.

206

1 Please, sir, consider the following.
2 Remove the prohibition of auto-daub and the 10-
3 second delay. I agree with the good folks up on
4 the board. These things don't sit right at eight
5 seconds. Depending on the rest of your
6 requirements, these things can go as long as
7 eight seconds, 10 seconds, 12 seconds. It can

8 just keep going on.

9 These standards appear to be designed to
10 limit participation rather than increase it. The
11 two-second delays will force synchronicity
12 between players and remove the spontaneity of the
13 games.

14 I mentioned to you folks before when we
15 did our government-to-government consultations,
16 there was a band out in the '80s, it was called
17 Devo, and everybody moved at the same time.
18 Well, that's exactly what it's going to look like
19 out there with our players that do choose to play
20 these games.

21 Remove the display restrictions, two
22 strings and multichord display requirements.

1 This is the cost the tribes must absorb that is
2 just not necessary. We have no problem
3 displaying this as a bingo game. We actively
4 promote it in our facility. Our Class II games
5 outperform our Class III games.

6 Heck! I don't want to say -- most of
7 these folks don't want to put two-inch letters on
8 the machines. I'd put six-foot letters on my
9 machine saying this is certainly bingo, big neon
10 signs pointing at them, because in the State of
11 Washington, the requirements that are there by
12 the state for our Class III games, we don't have
13 cash in. We don't have white area progressives.
14 We don't have a lot of things that Class II
15 provides for us. That makes those games more
16 appealing to our customer base.

17 Please remove all provisions under which
18 the NIGC attempts to assert jurisdiction over
19 private third party gaming laboratories. We feel
20 that this will lead to excessive pressure over
21 vendors and ultimately to less innovative game

22 designs. These folks have told you up here just

208

1 now, look, if it's not profitable, they can't be
2 involved in it. They're not in the business to
3 lose money nor are we. We have to take care of
4 our tribal programs.

5 Thank you, gentlemen.

6 CHAIRMAN HOGEN: Thank you. Any
7 additional comments or questions?

8 (No response.)

9 CHAIRMAN HOGEN: Well, let me ask a
10 question of the panel.

11 Right now, there is an air of
12 uncertainty, maybe only in the minds of the
13 National Indian Gaming Commission, but certainly

14 here, about what is or what isn't Class II. It
15 would seem to me if I were building and marketing
16 these machines, I would take comfort in a system
17 where there was some certainty or some clarity
18 with respect to where that line is in the minds
19 of the guys that we're regulating.

20 Is that a misperception on my part? Is
21 that not true? Do you understand what I'm
22 asking?

209

1 MR. HARRIS: I can't speak for these
2 guys, but I do know that the Bank of America put
3 in our line of credit that in big bold letters,
4 depending on regulatory statutes, whether or not
5 I can draw on that line of credit.

6 I mean, the entire industry's looking at

7 this, and for a small operator like Rocket that
8 our primary product is Class II, I mean this is
9 being watched around the country, and it's pretty
10 serious for us.

11 The minute that the regulations, if
12 they're issued, that's whenever we have the
13 certainty in which to even tell our software
14 developers now look at this and tell me what we
15 can do. We've seen the draft and our development
16 staff looked at it and said, geez, we don't know.
17 We don't think we can generate a game.

18 Gary did a great job on talking about
19 some of the numbers, but here's another number
20 twist for you. We have, let's say, 30 titles on
21 our network, 30 titles, four levels of
22 denominations, penny, nickel, quarter, dime,

1 whatever it happens to be. That's a 120 titles.

2 So, you say, okay, a 120 titles and then

3 whatever that number ends up being that we

4 consider to be a bingo game, let's say it's six

5 people, well, six times a 120, which I could

6 figure that out if I wasn't standing up here with

7 those bright lights on, --

8 MR. LOEBIG: 720.

9 MR. HARRIS: Thank you. Big number.

10 What are you going to do at 3 o'clock in the

11 morning when you're in Misqualli, Washington, and

12 you're looking for players? So, you have to have

13 a wider network game. That's technology. That's

14 expense.

15 Mr. Parker will tell you I've had some

16 phone calls with him at 3:30 at night when

17 there's a backhoe operator in Wyoming that cut a

18 line and Washington just dropped off the radar

19 screen. That stuff happens. That is bingo.

20 It's not a slot game where you can stand there

21 and play that box all day long. It's a live

22 interactive real-time game.

211

1 We can't even begin development till we
2 see what the things are, and I would assure you
3 to meet what we see to be the specs, it'll be
4 eight months to a year before we can comfortably
5 say we have a game that we can go give to Nick
6 Farley to run through his lab. Then we've got to
7 run it through 80+ tribal gaming commissioners,
8 run it through their lab.

9 Then, because it'll be a massive
10 software upgrade, we've got to send vans and
11 technicians to 80+ casinos to upgrade not just
12 the file servers, provided we have enough file

13 servers with the horsepower to conduct that kind
14 of game, then you have to upgrade every single
15 player station. Does it have enough memory? Is
16 the video card going to work? I mean, it's a
17 massive undertaking.

18 I think somebody in earlier testimony
19 had said 18 months, 16 to 18 months, maybe, and
20 lots and lots of money.

21 CHAIRMAN HOGEN: Yes, Gary?

22 MR. LOEBIG: Two points. One is

1 regulatory certainty is absolutely important to
2 manufacturers and absolutely important to the
3 industry. With regulatory certainty, tribes can
4 get loans for Class II facilities, manufacturers
5 can get loans. You know where you're going, you

6 can reduce your costs, you can avoid litigation.

7 So, I don't think that's necessarily an issue.

8 The issue is what does the regulatory

9 certainty provide, and my history in the paper

10 bingo business and Eric's history and other

11 people in this room, the paper bingo industry has

12 suffered from a lack of technology and it's

13 almost reduced to two manufacturers and that's

14 what I think the real concern is if you're a

15 manufacturer. It's not that you're certain that

16 you can produce something, but is it viable what

17 you're going to produce?

18 CHAIRMAN HOGEN: Well, it would be

19 useful to the Commission, I think, to have our

20 attention directed to those features that are the

21 most challenging; that is, if we're saying it

22 wrong and if there's a way to at least come close

1 to where we want to go or the way we'd propose to
2 go, but would be less problematic, less costly to
3 manufacturers and tribes, we'd surely like to
4 know that before we finalize any regulations
5 rather than after.

6 So, this has been an excellent
7 discussion. You've pointed out a lot of things
8 that bear very serious scrutiny on our part, but
9 it would be useful if you could -- you know,
10 don't assume we're smarter than we are. Point
11 those things out specifically and we'll guard it.
12 We're not going to share your proprietary
13 information to the extent that, you know, we're
14 cautioned about that, and I don't know that you
15 will be providing that exactly, but, you know, we
16 don't want to needlessly, you know, create chaos
17 if there's a better way to do it.

18 Question, sir?

19 MR. SOMDAY: Thank you. First of all,

20 I'm not the principal speaker for our tribe.
21 Someone else is going to give testimony, but I'm
22 glad you asked for questions.

214

1 First of all, if it ain't broke, don't
2 fix it. Indian tribes are capable regulators and
3 are doing a good job, as the Creek decision would
4 confirm.

5 Second one is if you were to ask some of
6 the elder players of these Class II machines,
7 bingo machines, pull tabs or whatever, do you
8 want slower games or do you want faster games,
9 they would tell you we want faster games. What
10 you're proposing now would slow it down
11 considerably and make it totally unattractive.

12 If I recall, the National Indian Gaming
13 Commission, your organization, approved machines
14 that would now be considered illegal under your
15 proposed legislation.

16 Thank you.

17 CHAIRMAN HOGEN: Thank you. We would
18 like the opportunity to submit some written
19 questions to the panelists and if you could
20 provide responses to those, that would be much
21 appreciated. Thank you very much.

22 Our next panel will address more

215

1 specifically Economic Impact and we have several
2 tribal leaders who will be addressing that.

3 So, let's take a few minutes to bring
4 the other panelists up and let's reconvene here

5 at 2:45.

6 (Recess.)

7 CHAIRMAN HOGEN: If you could please be
8 seated, we'll proceed with our next panel. The
9 schedule is moving along amazingly close to how
10 it was designed and that's a credit to the good
11 job that our presenters have done staying within
12 the parameters that we established and we're
13 appreciative of that.

14 All of this is extremely important. I
15 know five minutes is not really enough to tell
16 the whole story, but it'll hopefully point us in
17 the right direction.

18 This panel, consisting of tribal
19 leadership, will more specifically address
20 Economic Impact, and we are pleased to have from
21 the Poarch Band of Creek Indians Buford Rolin,
22 the Chair from the Confederated Tribes of the

1 Colville Reservation Michael Marchand, and from
2 the National Indian Gaming Association Ernie
3 Stevens, Jr., the Chair. He's accompanied by
4 Mark Van Norman, the Executive Director.

5 So, with that, Mr. Rolin, would you care
6 to proceed?

7 MR. ROLIN: Okay. Thank you, sir. Good
8 afternoon, Chairman Hogen and Commissioner
9 Choney.

10 My name is Buford Rolin. I'm the
11 Chairman of the Poarch Band of Creek Indians.

12 I appreciate the opportunity to be here
13 today and to share with you the reasons why we
14 object to the Commission's current activities as
15 they relate to the classification of games under
16 the Indian Gaming Regulatory Act.

17 Our primary objection to the rulemaking
18 is that it adds new requirements that must be

19 satisfied for a game to remain Class II. Because
20 the Commission has never before required Class II
21 games to contain these features, they are not
22 presently included on any existing game. As a

217

1 result, if these proposed rules are finalized,
2 all existing Class II games will instantly become
3 Class III and therefore require a tribal state
4 compact for their continued operation.

5 As you well know, the Poarch Band of
6 Creek Indians has conducted gaming in the state
7 of Alabama for more than 20 years. For the past
8 15 years, we've been attempting to negotiate a
9 tribal state compact. Although the state permits
10 a broad range of gaming that, if offered on

11 Indian lands, would fall within the category of
12 Class III gaming. The state has consistently
13 ignored our request to negotiate.

14 What's more is that during the very same
15 time as the state was refusing to meet with the
16 tribe, they have allowed Class III gaming to
17 flourish in Alabama.

18 Within the last five years in
19 particular, the scope of Class III gaming in
20 Alabama has grown dramatically. In 2003, voters
21 in two Alabama counties approved the operation of
22 bingo games by certain non-profit organizations.

1 Macon County, which is a mere 30 miles from the
2 tribe's Wetumca facility, is home to the Victory
3 Land Racetrack. Interestingly, the racetrack is

4 the only qualifying non-profit organization

5 within that county.

6 Under this authorization, the racetrack

7 now operates more than 3,000 electronic bingo

8 machines, machines that the tribe is prohibited

9 from operating. While these games satisfy the

10 state definition of bingo, they contain features

11 that, in the eyes of the Commission, transforms

12 them into Class III games, the most obvious of

13 these features being auto-daub. Despite the fact

14 that these one-touch games are being played

15 legally within the state, they're off limits to

16 the tribe.

17 Late last year, the racetrack in

18 Birmingham began operating electronic sweepstakes

19 machines. While the state challenged the

20 operation of this game, the court found them to

21 fall within a loophole of Alabama law. These

22 games are now spreading throughout the state,

1 further impacting our ability to remain

2 competitive.

3 Again, the Commission has advised us
4 that they would consider these games to be Class
5 III if we attempted to operate them.

6 At the very same time, the same time
7 that state voters were expanding the scope of
8 gaming in Alabama, our tribe was forced to scale
9 back our games. In early 2004, the Commission
10 identified a number of our games as being
11 questionable. Though we disagreed with the
12 Commission's findings, we removed 76 games and
13 modified approximately 600 others.

14 The tribe's effort to work with the
15 Commission resulted in a 56 percent decrease in
16 net income, a 56 percent decrease. Notably, the
17 game features that we were forced to removed are

18 the very same ones that are still being used at

19 the racetrack.

20 Unfortunately, the impact of the

21 Commission's directive was actually far greater

22 as tribes chose not to fire existing employees,

220

1 and as the state's racetracks continue to expand

2 and as sweepstakes games continue to spread, our

3 revenue continues to dwindle.

4 None of us can imagine any other type of

5 business that would be deemed denied the right to

6 expand while other competition is permitted to

7 thrive. This, however, is exactly what is

8 happening to us. The state continues to refuse

9 to negotiate with the tribe for the very same

10 game they are permitting elsewhere. They are
11 also opposing our pending request for secretarial
12 procedures.

13 Adding insult to injury, the Commission
14 is now attempting to narrow the scope of Class II
15 gaming. With the addition of random
16 requirements, the proposed rules would limit the
17 tribe to even slower playing and less
18 entertaining games than we currently operate.
19 Our competitors, however, will remain unaffected.

20 The impact of this regulation on my
21 tribe is quite simple. We will no longer be able
22 to keep pace with our competitors and eventually,

1 we'll be forced to close our doors. Such a
2 dramatic change to the legal landscape seems

3 unconscionable, particularly given the lack of
4 any supporting court action or congressional
5 enactment.

6 If the Commission moves forward with
7 this rulemaking, it is our estimate that the
8 revenues of our Etmo facility will be impacted by
9 an additional 80 percent. The impact will only
10 increase as the casinos on the Gulf Coast damaged
11 by the last year's hurricanes resume operation.
12 With competition in Central Alabama continuing to
13 expand uninhibited, the tribe's facilities in
14 Montgomery can no longer remain competitive and
15 would be forced to close, closure that would
16 result in the loss of more than 500 jobs.

17 We object to the fact that we will be
18 required to replace all of our games with slower
19 and less profitable games. Slowing the game to
20 the point where it is no longer economically
21 viable can by no stretch of the imagination be
22 seen to further the intent of IGRA. This is

1 especially true as technology was never intended
2 to limit the commercial success of an industry.

3 The Commission should not place tribes
4 at a competitive disadvantage, particularly in
5 the absence of a seminole fix. Consideration
6 must be given to the tribes that find themselves
7 in the rare situation in which we find ourselves.
8 We should not be penalized because a state
9 refuses to follow the law. We should be allowed
10 to operate not only with these games authorized
11 by IGRA but also those that incorporate features
12 that are legal in our state.

13 If the Commission insists on moving
14 forward with the rulemaking, an appropriate
15 grandfather clause must be incorporated. Gaming
16 is the primary economic enterprise for my tribe.

17 It has provided our rural communities with jobs,
18 both for tribal members and our neighbors. It
19 has also allowed us to add to our community's tax
20 base.

21 In fact, in 2004, our operations
22 generated more than \$15 million in federal

223

1 income, payroll, sales and excise tax. Our
2 payroll that year exceeded 11 million and we
3 spent more than 35 million in services, goods and
4 services.

5 Gaming has provided us the ability to
6 educate our children, build houses and medical
7 clinics and improve the lives of our elderly. To
8 eliminate these benefits would be a devastating

9 blow to both the tribe and the other residents of

10 Alabama.

11 While the long-term implications of this
12 rulemaking on all tribes are immense, few will be
13 impacted as Poarch Creek. Our ability to conduct
14 gaming on an equal footing with our competitors
15 is already severely limited. If the Commission
16 finalizes these proposed rules, our ongoing
17 struggle to remain equal footing with our
18 competitors will simply become an impossibility.

19 I thank you for the opportunity to
20 provide these comments and we will be submitting
21 written comments prior to September 30th.

22 CHAIRMAN HOGEN: Thank you, Chairman.

2 MR. MARCHAND: Good afternoon, Mr.

3 Chairman, Vice Chairman, staff.

4 My name is Michael Marchand. I'm

5 Chairman for the Colville Business Council and I

6 represent our tribe with 9,200 members in

7 Washington State. I'm pleased to represent our

8 views on Economic Impacts of the proposed rule on

9 Class II gaming.

10 The Colville Tribe has 1.4 million acres

11 of trust and a lot of lands. Although not

12 considered a single Indian tribe, the

13 Confederated Tribes actually are comprised of 12

14 smaller tribes from the Washington, British

15 Columbia and Idaho and Oregon areas.

16 Our location is quite remote from the

17 main commercial corridors of Washington State.

18 The nearest entrance to the interstate highway is

19 approximately a hundred miles from Municipalin,

20 the seat of our tribal government. Our

21 reservation, income taxes, lands, economically

22 depressed, rural areas, North Central Washington.

1 Our tribe with its corporate entity, the
2 Colville Tribe Enterprise Corporation, employs
3 over 2,000 people, many of whom are also non-
4 unions. As one of the largest employers in our
5 area, the tribal payroll contributes substantial
6 sums to the off-reservation economy.

7 The economic growth of our tribe has
8 increased substantially because of Indian gaming.
9 We currently operate three relatively small
10 casinos. Our gross gaming revenues have rarely
11 approached 25 million in any fiscal year and have
12 declined steadily over the past several years.
13 We lost about \$4 million revenue after our tribal
14 state compact was finalized in 2004. So, we're
15 not "a rich gaming tribe," but just income has

16 enabled us to significantly expand the government
17 services to our people and provide jobs for our
18 members and non-members alike.

19 As of last month, the tribe's three
20 casinos employed 314 people. Our tribe uses 80
21 percent of casino net revenues to fund essential
22 tribal governmental services, including services

226

1 for elders, fire safety, police protection,
2 gaming regulation, planning and social health
3 services, housing and education. We do not use
4 any gaming revenues for per capita payments to
5 our members. Another 20 percent gets reinvested
6 back into the economic development in our tribe.

7 Because we are located in an

8 economically-depressed area, the Colville Tribe
9 would like to expand its Class II gaming on
10 several new sites. Under our compact, we are
11 allowed six casino sites in the State of
12 Washington, but because of the limitation on the
13 number of Class III machines, we have filled up
14 three of the casino sites under the state
15 allocations. With the continued expansion, we
16 would have to go to the Class II machine.

17 We are far from urban population centers
18 and major transportation corridors to become a
19 big casino tribe. That's not really possible for
20 us. Our proposed ventures will not change this
21 outcome. Rather, it would provide us the chance
22 to expand our market, recoup our postcompact

1 losses and generate additional much needed
2 revenues to fund Colville tribal government as
3 well as provide jobs and economic growth for the
4 area. Yet, we face substantial hurdles,
5 including the formidable obstacles created by the
6 NIGC's proposed rule.

7 The Indian Gaming Regulatory Act has
8 been the single most successful economic
9 development legislation ever passed by Congress.
10 As Chairman Hogen stated in an address to the
11 Senate Committee on Indian Affairs in September
12 21, 2005, in the years since IGRA was passed,
13 Indian gaming has grown exponentially. Revenue
14 from Indian gaming have built roads, schools, and
15 health centers on reservations across the country
16 and greatly reduced reservation unemployment in
17 many areas.

18 Chairman Hogen also assured tribes at
19 Tacoma last month that he's trying to permit a
20 fun, profitable, attractive game that can be
21 played in Class II.

228

1 this proposed rule would have the opposite
2 effect.

3 The games under this rule would be
4 exceptionally slow, less aesthetically pleasing,
5 less enjoyable, far less appealing to players and
6 dramatically less profitable than current Class
7 II games, not compared to machines and
8 uninteresting facilities would result in
9 substantial loss of patrons and revenue causing a
10 disproportionate loss of jobs.

11 Tens of thousands of American jobs would
12 be lost in areas of this country that can least
13 afford it and Colville Reservation is one of
14 those areas.

15 The negative impact the proposed rule
16 will have a ripple effect throughout Indian
17 communities as well. When casino employment goes
18 down, dependence on state and local support
19 systems goes up. Severely limited governmental
20 resources are stretched to the breaking point.
21 The ability to purchase goods and services
22 diminish. Businesses and lending institutions

229

1 are impacted as well.

2 When citizens are gainfully employed in
3 tribal casinos that require satisfactory credit
4 rating, clean criminal record, no contact with
5 known criminals, maintenance of suitability for
6 licensing, the ripple effect in state and local

7 communities is enormous. There is a reduction of
8 public entitlement costs, emergency room use,
9 drug offenses, domestic violence, property
10 crimes, alcohol-related crimes, court hearings,
11 incarcerations and unemployment claims.

12 There is also an increase in the
13 employment earnings and payment of taxes and the
14 stabilization of family life that helps keep the
15 children in school and out of trouble. At
16 Colville, we've seen a number of success stories
17 where tribal members employed by our casinos have
18 turned their lives around and become positive
19 role models.

20 In Washington State, Indian gaming
21 greatly benefits the non-Indian communities as
22 well. This is evidenced by the fact that fully

1 75 percent of tribal gaming casino employees are
2 non-Indians in the State of Washington. Casinos
3 and other tribal businesses, although not
4 directly taxed by the state, have spawned a \$3.2
5 billion Indian economy that generates jobs,
6 spending in taxes throughout the region.

7 Most of the purchases generated by this
8 Indian economy are made off the reservation and
9 they're subject to state taxation. In Washington
10 State, the state and local taxes from Indian
11 gaming total a \$141 million annually.

12 Class II gaming is a safety net for
13 tribes that cannot engage in Class III gaming.
14 This Class II insurance policy is particularly
15 important because of blanket prohibitions under
16 state law for tribes located in states that
17 refuse to negotiate and bad faith for Class III
18 gaming.

19 IGRA's good faith requirements were
20 effectively destroyed by the Seminole decision.

21 The proposed Class II rules would effectively
22 relegate Class II gaming to the junk heap,

231

1 leaving tribes at the mercy of states for Class
2 III activities.

3 Smaller tribes as well as tribes with
4 limited income will also be disproportionately
5 impacted. Adding insult to injury, if they
6 cannot afford to send representatives to meet the
7 NIGC, they're relegated to a paper response and
8 effectively denied government-to-government
9 consultation.

10 Chairman Hogen claims that there is a
11 desperate need to bring some clarity to the Class
12 II gaming and has indicated that this proposed
13 rule is for the benefit and protection of tribes.

14 He says that NIGC will no longer have to shut
15 down Class III gaming under the guise of Class
16 II.

17 With all due respect to Chairman Hogen,
18 Colville does not share the confusion the NIGC
19 has over what constitutes a Class II bingo game
20 nor do federal courts. In fact, this proposed
21 rule would also outlaw the Class II electronic
22 bingo games previously approved by the NIGC and

1 Chairman Hogen's own statement in a letter to the
2 Oklahoma tribes, that it doesn't matter how the
3 games look, if it is bingo, it is Class II.

4 The NIGC has repeatedly told tribes that
5 no economic impact study has been done, no

6 determination has been made about the economic
7 devastation the proposed rule will have in Indian
8 Country. Unfortunately, the NIGC has the cart
9 before the horse.

10 The Colville Tribe urges the NIGC to
11 conduct and publish a thorough economic study
12 before finalizing this proposed Class II rule.
13 We ask that the NIGC stop the current regulatory
14 train and take into consideration both the
15 considerable information obtained from tribes in
16 response to the current proposal and the economic
17 impact data from the study and should the NIGC
18 decide to proceed with the Class II proposal,
19 ensure that the proposal takes into consideration
20 all of the above and provides sufficient time and
21 meaningful opportunity for additional tribal
22 input before finalizing the Class II rule.

1 As a federal trustee under IGRA, the
2 NIGC has a trust responsibility to promote tribal
3 economic development, tribal self-sufficiency and
4 strong tribal government, not to be an agent of
5 economic destruction.

6 Under 25 USC 2701(4), Congress enacted
7 IGRA to protect Indian gaming as a means of
8 generating tribal revenue. 25 USC Section
9 2702(3), emphasis added. However, this proposed
10 rule would diminish tribal revenues by
11 establishing an overly-restrictive regulatory
12 regime that violates both the basic tenets of
13 IGRA and longstanding federal policy.

14 Thank you for this opportunity to
15 present my tribal views on these issues, and I'm
16 pleased to answer any questions. Thank you.

17 CHAIRMAN HOGEN: Thank you. Mr.
18 Stevens?

19 MR. STEVENS: Good afternoon, sir. My

20 name is Ernie Stevens, Jr., and I'm honored to be
21 here. I'm a member of the Oneida Nation of
22 Wisconsin. I'm honored to serve as Chairman of

234

1 the National Indian Gaming Association.

2 With me today is Mr. Mark Van Norman,
3 our Executive Director at the National Indian
4 Gaming Association. He's a member of the
5 Cheyenne River Sioux Tribe.

6 Thank you again, Chairman Hogen,
7 Commissioner Choney, for this opportunity.

8 As you know, NIGA's a non-profit
9 organization made up of a 184 federally-
10 recognized tribal nations. Our mission is to
11 protect and preserve tribal sovereignty and the
12 ability of tribes to generate revenue through

13 gaming.

14 Because of our mission, I must state
15 that the National Indian Gaming Association is
16 strongly opposed to the NIGC's proposed
17 classification of games regulations.

18 The proposed rule would infringe on
19 tribal sovereignty and undercut the ability of
20 Indian tribes to generate revenue through
21 currently federally-sanctioned technological aids
22 to Class II gaming.

235

1 I know time is limited, so I'll briefly
2 detail NIGA's opposition.

3 First and foremost, the proposed rule
4 infringes on tribal sovereignty. Congress,

5 through the Indian Gaming Regulatory Act and the
6 NIGC in the preamble to the proposed rule,
7 acknowledged that Indian tribes are primary
8 regulators of Indian gaming.

9 Tribal governments take their role as
10 primary regulators seriously. In 2005 alone,
11 tribes spent more than 300 million on Indian
12 gaming regulation.

13 While the NIGC acknowledges the role of
14 tribes as the primary regulators of Indian
15 gaming, the proposed rule offers no meaningful
16 input or role for tribal regulators in the
17 classification of the games process.

18 Under the proposed rule, the NIGC
19 testing labs makes a determination of whether the
20 game is Class II or Class III. If the lab makes
21 a tribal positive finding that the game is Class
22 II, tribes must still wait to see if NIGC is

1 satisfied and does not challenge that decision.
2 If, however, the lab finds that the game is Class
3 III, then it's final. Tribes cannot challenge
4 the decision. In the end, there is no meaningful
5 role for the tribe to play.

6 We object to the absence of due process
7 for tribes and request that the NIGC revise the
8 proposal to engage the tribal regulators on a
9 government-to-government basis.

10 In July of 2002, when the NIGC withdrew
11 an earlier proposal for classification
12 regulations, the agency stated the following, and
13 I quote: "As a matter of sound public policy as
14 well as in the interest of fairness and due
15 process, a regulated industry ought not be forced
16 to risk enforcement action in order to obtain
17 legally-binding and judicially-reviewable
18 classification opinion from the Commission."

19 The proposed rule does not avoid this
20 result. Tribes would be forced to risk
21 enforcement in order to obtain a judicially-
22 reviewable opinion.

237

1 The primary purpose stated by the NIGC
2 for this proposal is to set a bright line between
3 Class II and Class III games. The regulations as
4 drafted wrongly seek to classify games based on
5 appearance, speed and profitability of electronic
6 aids rather than IGRA's definition. Not only is
7 this counter to the law, it unfairly robs the
8 tribes of economically-viable Class II gaming.

9 The bright line sought by regulations
10 end up offering nothing more than confusion and
11 unpredictability for Indian tribes and tribal

12 regulators. Essentially, for tribes, it's all

13 risk and no reward.

14 The second reason for our opposition is

15 that the proposal would cause significant

16 economic damage to tribes that rely on Class II

17 gaming. The proposal severely limits the

18 economic viability of technological aids to Class

19 II games.

20 In 2005, Class II gaming generated 2.5

21 billion in gross revenues, created over 77,000

22 American jobs and generated over 1 billion in

1 federal, state and local income, sales and other

2 taxes, and decreased welfare and unemployment

3 benefit payments.

4 Industry leaders have informed us that
5 no current electronic Class II games would meet
6 the standards set by the proposed rule. As a
7 result, all Class II games would need to be
8 reconfigured and the tribal governments end up
9 footing the bill for this reconfiguration.

10 In addition, once the games return to
11 the floor, our conservative estimates show that
12 the proposed rule would cut the economic activity
13 created by Class II gaming in half.

14 Many of those tribes that rely on Class
15 II gaming are located in economically-depressed
16 regions of Indian Country. The important jobs
17 that Class II gaming provides to these
18 communities are irreplaceable.

19 The NIGC has not even considered what
20 the economic impact will be to the communities
21 that can least afford the expenses required for
22 compliance. We have great concern about the

1 negative impact that the NIGC proposal will have
2 in these regions.

3 We believe that these impacts can be
4 mitigated by changing the proposal to eliminate
5 unnecessary restrictions on prize structure,
6 appearance, and speed of play of Class II aids.

7 We hope that the NIGC shares our concern and will
8 make these necessary changes.

9 Further, tribal victories and costly
10 hard-fought legal battles will be uprooted by the
11 proposal, including the very games affirmed by
12 the federal courts and previously authorized by
13 the NIGC. Millions of dollars that have been
14 invested in reliance on current settled law will
15 be lost, ensuring future litigation.

16 The loss of millions invested may not
17 even be as staggering as the billions of dollars

18 of future Class II earnings that will be divested
19 from Indian Country. If the new rules are
20 enacted, tribal governments will lose nearly 3
21 billion annually based on current Class II
22 earnings. These losses will inevitably grow not

240

1 just because of the reduced growth of Class II
2 games in areas where states refuse to negotiate
3 tribal state compacts in good faith, these
4 problems will be magnified because the tribes are
5 unfairly blocked from Class III gaming.

6 Finally, our biggest objection to the
7 proposed rule is based on the fact that it
8 ignores 18 years of precedent. The
9 classification of Class II games has evolved over
10 the past 18 years through federal court

11 decisions, NIGC advisory opinions, and other
12 changes in the law. The tribes have gained a
13 significant amount of clarity through these
14 decisions.

15 We are concerned that the regulation
16 fails to adhere to the federal courts'
17 interpretation of the law for Class II game
18 classification. Moreover, as a fundamental
19 principle of Indian law and because the NIGC is
20 specifically tasked to oversee the interests of
21 tribes, the Commission must interpret the law
22 liberally in favor of the tribes.

1 However, because the proposed rule is
2 contrary to the cases and the interest of the

3 tribes, NIGA's concerned that the legal principle
4 has been abandoned. We believe that to follow
5 the law, the NIGC must reverse course on the
6 proposed rule to ensure that it is consistent
7 with fundamental fairness and with the holdings
8 of the court.

9 Mr. Chairman, Commissioner Choney,
10 Indian gaming is the Native American success
11 story and Class II gaming is indispensable to
12 this success. In terms of federal revenue,
13 Indian gaming overall contributed 6.1 billion in
14 federal revenue and 1 billion to the Treasury
15 last year. In other words, Indian gaming
16 generated more in federal revenue and revenue
17 savings than the entire budget for the Bureau of
18 Indian Affairs and the Indian Health Service
19 combined. Class II gaming made up an important
20 contribution to the federal budget.

21 Class II gaming is funding tribal
22 essential services, including new schools, youth

1 centers, hospitals and health clinics, elderly
2 nutrition, and child care centers, police and
3 fire protection, water and sewer services,
4 transportation, and cultural preservation, just
5 to name a few.

6 Frequently, federal funds are
7 unavailable or simply in too short supply to
8 build these facilities. No state funding is
9 available for these projects. Without Class II
10 gaming, these facilities would never be built in
11 many areas of Indian Country.

12 The proposed rule for the classification
13 of games neither protects nor enhances the
14 economic opportunities created for tribes through
15 Class II gaming. Instead, it severely limits
16 these opportunities.

17 We request that the NIGC adhere to its
18 responsibility to interpret the law fairly,
19 independently and in accordance with the intent
20 of Congress and the federal courts and to engage
21 with tribes in meaningful consultation.

22 Mr. Chairman, Commissioner Choney, I

243

1 thank you for your time this afternoon.

2 CHAIRMAN HOGEN: Thank you, Mr. Stevens.

3 Are there any comments or questions

4 regarding this subject from the public?

5 MR. MARTIN: Good afternoon. My name is

6 Tim Martin. I'm President and CEO of Creek

7 Indian Enterprises, the economic development arm

8 of the Poarch Band of Creek Indians.

9 As my chairman has most adequately

10 stated, there is a uniqueness that follows on the
11 Poarch Band of Creek Indians and that uniqueness
12 is a total unfair playing field.

13 My question to the Commission is the
14 consideration where a state which will not
15 negotiate in good faith a Class III compact but
16 yet has games that you would classify as Class
17 III games, but they do not classify them as Class
18 III games because they're silent on the
19 classifications, they simply say that they need
20 to be games of bingo, where would the Commission
21 consider recognizing tribal sovereignty and
22 recognizing state sovereignty whereas to where a

2 the classification of bingo games allow the
3 tribes equal footing to play those same games on
4 their reservations?

5 CHAIRMAN HOGEN: That's a very
6 appropriate subject, I think, for us to consider.

7 These several examples that have been
8 listed where states are openly and notoriously
9 conducting Class III gaming that refuse to come
10 to the table and negotiate a Class III compact
11 are absolutely the most challenging. You know,
12 we would like to be able to approach everything
13 evenly, but if you've got 28 states that step up
14 to the plate, negotiate compacts, and in effect
15 do it fairly, what do you do in those few that
16 don't? Should you play by a different set of
17 rules?

18 I would, you know, much appreciate any
19 suggestion or any proposal that might point a way
20 to in effect look at what some states permit or
21 provide to see if that could be weaved into any
22 scheme that we would finally adopt. We don't

1 have that present in the current proposal, but
2 we're open to suggestion in this regard.

3 MR. MARTIN: Well, our tribe's
4 suggestion is that you allow and recognize state
5 sovereignty and allow the tribes to, as IGRA
6 calls for, to play games that are accepted in
7 that state and their classification. An easy fix
8 for our tribe as far as when a state is not
9 negotiating in good faith but they allow games
10 that under your classification would be Class III
11 games, but allow us to play what the games are
12 being played in the state. That is a
13 satisfactory fix in our state, sir.

14 CHAIRMAN HOGEN: Thank you. We will
15 give consideration to that approach.

16 George?

17 MR. TIGER: Chairman Hogen, Mr. Choney,

18 all those that have been on panels today, I just

19 want to say thank you for enlightening me because

20 I was taught if you listen before you say

21 anything and so I'm going to -- also, I have a

22 letter for you that I've submitted to you. I

246

1 have a hard copy that I'd like to have on record

2 concerning these hearings.

3 My name is George Tiger. I'm the

4 Speaker of the Legislature for the Muscogee Creek

5 Nation in Oklahoma. It's good to see our

6 relatives from Alabama.

7 As you know, as Indian people, it seems

8 like we go in cycles and that's kind of where I'm

9 at on this thing. The Muscogee Creek Nation was
10 the first tribe to conduct gaming in the State of
11 Oklahoma. We came from being an innovator in
12 gaming in Oklahoma to a public nuisance and being
13 taken to court to now being listed as a tourism
14 attraction in Tulsa, Oklahoma. So, we've kind of
15 went the gauntlet.

16 But I just want to say this. From
17 everything that I've heard today from all the
18 panels and all these proposed changes that are
19 being talked about, I believe that if it is
20 published, that Indian gaming as we know it today
21 dies and since that seems to be kind of the road
22 we're taking, I just want to say that when I go

1 home to my legislature and my colleagues that I
2 serve with, which number 26, I'm trying to figure
3 out how I can tell them that we just started
4 building a \$120 million facility in Tulsa,
5 Oklahoma.

6 So, does that mean that we're going to
7 have a hard time recouping our investment or does
8 it mean that if Indian gaming as we know it today
9 dies, does that mean that I'm going to have to
10 ask my good friend, the chairman of the proud
11 Comanche Nation, who owns a funeral home, to come
12 and do a funeral for Indian gaming in the \$120
13 million facility?

14 Those are things that I'm hearing, and
15 all I can say to you is I know that you have a
16 difficult job, but I look at you as our relatives
17 because all of us are and I know you're doing a
18 job, but again it kind of goes back to how
19 history has always had Indian people problems
20 dealt with. We fight against each other and that
21 seems to be where we're at.

22 When does the state give up their

1 sovereignty? This afternoon, we heard someone
2 say that they'd like to see the tribes giving up
3 their sovereignty on some of these issues. Well,
4 when does the state? When does the federal
5 government actually come and negotiate with us in
6 a good faith atmosphere?

7 So, when I go home tonight or in the
8 morning, the message I have is basically I really
9 don't know what to tell them because we know that
10 history says that we can have all these hearings
11 and have all the input that we're supposed to be
12 having as Indian people, but when it's all said
13 and done, it's over.

14 Thank you.

15 CHAIRMAN HOGEN: Thank you, Mr. Tiger.
16 Let me commend to you the preamble to the
17 proposed regulations that we published in the
18 Federal Register on the 25th of May.
19 We've been, you know, doing much of the
20 talking when we've gone out to Indian Country and
21 the 70+ tribes we met with. We also did a lot of
22 listening. We really didn't set aside time to

249

1 try and tell our whole story, and I think, you
2 know, when we go back to the drawing board, we
3 will -- if we do finalize regulations, they will
4 reflect the concerns that we've heard here today.
5 But, you know, I think we tried to
6 explain where we were coming from and why we felt
7 this was needed as well as we could in the

8 preamble that we published in the Federal
9 Register and before anybody, you know, just draws
10 all of their conclusions from what's said here
11 today, I encourage you to look at that.

12 Yes, sir?

13 MR. PETERS: Thank you for allowing us
14 time.

15 My name is Jim Peters. I'm the Tribal
16 Chairman of the Squakin Island Tribe.

17 We've had occasion a couple of times,
18 Chairman, to talk on some issues out in
19 Washington area, and Commissioner.

20 One of the things I heard you say
21 earlier today that you were going to listening to
22 what was being said here today, and I hope you do

1 listen to that because I know we've got a lot of
2 facts out on the table. We have a lot of
3 economic studies, stacks and stacks, that prove
4 the benefits of tribal gaming facilities in their
5 areas.

6 But one of the other things is that
7 regulations are usually created to protect
8 something. The Northwest tribes are very
9 involved in the co-management of natural
10 resources in the Northwest area, and we're
11 protecting salmon resources, natural resources in
12 general, so that they don't go extinct, and that
13 our quality of life in that state stays at a
14 standard not just for the tribes but for all of
15 the citizens of Washington State.

16 So, there's a purpose behind those type
17 of things and part of that is that we're
18 regulating those and also allowing the timber
19 industry, the agricultural industry, the builders
20 and the well drillers to still be able to make
21 money at what they do, and so they're still

22 surviving. The natural resources are still

251

1 surviving, and there is a needed regulation there
2 that's put in place, and we adapt that every once
3 in awhile.

4 However, this regulation is adapting to
5 regulate, I believe, the bottom line of the
6 tribes making money. We have been successful
7 with this enterprise and for some reason, the
8 federal government, the state governments are
9 afraid, that every time the tribes meet a certain
10 success level, there's a lot of legislation,
11 there's a lot of initiatives, there's a lot of
12 anti-tribal senticisms that start to occur and we
13 have to spend our resources to battle those. So,

14 this isn't anything different than what we are
15 used to, but again it's all about the money that
16 we have.

17 One of the things that I wanted to make
18 clear is that Squakin Island Tribe is a small
19 tribe in Washington. We are the Number 1
20 employer of Mason County. Our economic
21 development in our area has brought Mason County
22 out of a depressed state up to the level that

252

1 it's out of that status. I don't know what it
2 is, but it's definitely not considered as a
3 depressed county anymore in Washington State.

4 So, Mr. Chairman, I would like to
5 hopefully, please, listen to what I have to say
6 in this last thing, is that the impacts that this

7 regulation's going to have is not only loss of
8 jobs in that county, that's not just tribal jobs,
9 but there are loggers that have been retrained,
10 there's fishermen that have been retrained to
11 come to work at our facilities, but it's the
12 daycare center, state of the art daycare center
13 that we built with our money. It's the education
14 program that we have at our tribe that takes care
15 of our kids as soon as they're in daycare all the
16 way up to graduation. It's the college
17 scholarships that our kids are receiving now that
18 will be able to go to colleges and fulfill their
19 dreams.

20 Elder programs, law enforcement, fire
21 fighting, fire protection services. We have an
22 agreement with the local fire district of

1 upgrading their station and their ability to be
2 able to respond not only to the reservation but
3 to that area of the county.

4 The other thing is that we're not only
5 providing this for our own people but we are
6 issuing scholarships to the local high schools in
7 Mason County that are open to all students. All
8 of this will be very impacted if this occurs, and
9 it's not just the Squakin Island people, it's the
10 people of Mason County, Jefferson County, Grays
11 Harbor County, Thurston County where our tribal
12 members go, where those citizens of those
13 counties come and work at our facilities and
14 utilizes the resources that we have there.

15 So, please listen to that, take that
16 home, and please don't listen to -- you know, one
17 of the concerning things that I've heard from the
18 representative of our state was the probable
19 illegal activities.

20 I can't comprehend how you deal with

21 that because everything is probable, and I think

22 if we take it -- I haven't seen any facts that

254

1 there has been illegal activities. There's

2 always this fear factor thrown out there.

3 Federal government, state government.

4 You guys don't have to be afraid of us. We are

5 very successful. If we work together, we can

6 protect each other and for all of our citizens.

7 So, just please take that home.

8 Thank you.

9 CHAIRMAN HOGEN: Thank you. And we will

10 take very seriously the concern not only for the

11 tribal folks that are dependent on these revenues

12 but the surrounding communities and the witnesses

13 here in this panel dramatically emphasized and
14 demonstrated that.

15 You pointed out the concern or the
16 participation your tribe participates in in
17 trying to prevent species from going extinct.

18 Well, similarly, we are concerned. We don't want
19 to see Class II gaming go extinct. If in fact
20 you can't one day tell the difference between
21 what's Class II and Class III, I am concerned
22 about that extinction.

255

1 We've heard today that no, there's
2 plenty of difference between what we're doing as
3 Class II and what's Class III, and we will bear
4 that in mind, but our concern has not been driven
5 by the fact that tribes have been successful and

6 have made a lot of money in Class II gaming that

7 we feel that's gone too far. Just the opposite.

8 We've been proud to be a part of the

9 dramatic growth in gross gaming, net gaming

10 revenues for Indian tribes through gaming and we

11 want to continue to play that role.

12 Yes, sir? One more question.

13 MR. YANITY: Shawn Yanity,

14 Stillaguamish, and you forgot to mention you're

15 the gateway to the Olympics. That's one thing

16 they pride themselves on. They're the gateway to

17 the Olympic Mountains.

18 Our tribe just met with the City Council

19 of Arlington and we've been fostering a great

20 relationship with the city. Our casino's outside

21 the city limits, but our admin office and a lot

22 of our clinics and facilities are inside the city

1 limits.

2 One of the things that we like to boast
3 is we foster a great relationship with the city
4 and they're seeing huge benefits come to their
5 community because of the casino. Our kids go to
6 public schools. Since we don't have a large
7 reservation, we have scattered parcels of land,
8 our kids go to public schools. We've dumped a
9 lot of money into those programs, tutoring
10 programs. Social services is a huge thing with
11 our tribe.

12 So, has the Commission fully evaluated
13 the cascade effect on tribal services and tribal
14 business? Many tribal businesses and tribal
15 services are only possible due to the revenue
16 stream provided by the tribe's casino.

17 Currently, our Class II machines make up
18 18 percent of our total floor. Should the
19 economic viability of these machines be removed,

20 it will affect fully 25 percent of our facility's
21 revenue stream. Add this to the projected impact
22 on the neighboring economies, utilizing a local

257

1 multiplier effect, and the total impact on our
2 small facility and the surrounding community is
3 frightening.

4 If we take the \$185 win per machine per
5 day we currently enjoy times it by 90 Class II
6 machines in our facility, 365 days per year, we
7 estimate gross revenues of \$6,077,250. According
8 to Kensing theory, we can assume \$10 generated by
9 Class II machines in our facility will create \$40
10 in total income to the local economy. Using this
11 multiplier, the local communities can expect to

12 see a substantial decrease in the basically \$24.3
13 million of these machines that adds to the local
14 economy.

15 Thank you.

16 CHAIRMAN HOGEN: Thank you. One final
17 question here.

18 MR. COLEMAN: Thank you, panel. Again,
19 thank you, Commissioner.

20 As I shared with you earlier today, the
21 Nooksack Indian Tribe has doubled in population
22 in the past eight years. I'd like you to take

1 the opportunity with that information to go to
2 some of your counterparts, some of them that work
3 in this building here, Bureau of Indian Affairs,
4 find out how much services have increased in that

5 time frame, go to the Indian Health Services,
6 find out how much has increased in their services
7 for our tribe.

8 We need this additional economic engine.

9 Our existing casino is starting to flatten out.

10 So, it's one of the older ones in Washington

11 State. We need additional help. We're looking

12 to you for that help.

13 Last year when we did a feasibility

14 study, it says these Class IIs are going to help

15 you. We're going to become more self-sufficient

16 but not by doing these changes. We're going to

17 start stepping backwards. We're going to have to

18 start putting more people back on the social

19 services. Don't let us do that. Help us make us

20 be more self-sufficient and help our people.

21 Thank you.

22 CHAIRMAN HOGEN: Thank you. With that,

1 we'll conclude this panel. Thank you very much
2 for your participation. We may have some
3 questions we might want to submit to you with
4 respect to some of the specifics, and if you
5 could respond to those, we would appreciate that.
6 Thank you.

7 We have one final panel before we go to
8 a public comment period. So, let's commence in
9 10 minutes, at 3:55.

10 (Recess.)

11 CHAIRMAN HOGEN: If you would have your
12 seats, please, our panel is assembled and we are
13 soon ready to proceed.

14 We are turning again to tribal leaders
15 and tribal leaders come to us from all across the
16 country here. The geography of the country is
17 well represented in this panel.

18 Chief Paul Spicer from the Seneca-Cayuga

19 Tribe of Oklahoma is present as is Chief Jim
20 Ransom of the St. Regis Mohawk Tribe, Rogelio
21 Elizondo from the Kickapoo Traditional Tribe of
22 Texas, and Erma Vizenor, Chairwoman of the White

260

1 Earth Tribe, and the Pechanga Band from
2 California is represented by Chair Mark Macarro.

3 We are then ready to hear from the
4 Tribal Leadership. Chief Spicer?

5 Panel 6 - Tribal Leadership

6 MR. SPICER: Thank you, Chairman Hogen.
7 Thank you, Commissioner Choney, for allowing us
8 this time today.

9 Most of my prepared text was covered in
10 about the first two or three speakers. I'm not

11 an intellectual genius by any means, but what I
12 did, I discarded my prepared text and I made a
13 few notes as the day's gone by and I'd like to
14 address some of the things that I've noticed.

15 There was a lot of eloquence here today
16 and a lot of good speakers that made a lot of
17 excellent points, but those points have been
18 made, sir, all across the country at these
19 meetings that you've conducted and I'm just
20 wondering if they had no impact on the
21 Commission's decisions up to this point, how much
22 impact will they have today?

261

1 You know, in my heart, I'm wanting to
2 believe that you're truly considering what was
3 said today, but inside, I've got this nagging

4 little feeling that this is just to fill a
5 square. I'm hoping that my heart's telling me
6 the right thing, that what was said today is
7 considered.

8 I'd like to talk a little bit about the
9 blurring. Blurring and the bright line is not
10 addressed in any of the statutes or court cases
11 that have come up. It's a relatively new term.
12 We have adequate differences now between Class II
13 and Class III gaming. I'm not sure why it's
14 coming into question now.

15 The rules are there. You know, they
16 should be enforceable if they're rules. If this
17 is happening, why is Justice Department not
18 taking the tribes to court? As you're probably
19 aware, the tribe that I represent, the Seneca-
20 Cayuga Tribe of Oklahoma, has had two of the
21 major five gaming issue court cases. We won both
22 of ours that we were involved in, and what

1 basically I'm telling the panel and the
2 Commission is that we intend to challenge some of
3 these things in court again.

4 We want to take these issues using the
5 same lawyers that both sides have had in the past
6 before the same judges that have ruled in our
7 favor and hopefully those judges will once again
8 rule in our favor, but I don't know where this
9 blurred line and bright lights and bells and
10 whistles, where all that came from, but in my
11 opinion, it's an attempt to destroy Class II
12 gaming.

13 Now, those of us in Oklahoma, you know,
14 it's not a death knell. It takes away a lot of
15 our leverage with the state whenever the compacts
16 come up. We have no real weapons, but for some
17 of the states where the tribes don't have Class

18 III gaming, you're destroying them. You're
19 destroying their economy. You're destroying
20 their newfound status in life.

21 Some of the folks have talked about
22 clinics and have talked about schools. These are

263

1 important things. I know sometimes when you're
2 in Washington and you look out, it gets a little
3 blurry out there. That might become a blurred
4 line, but there's real people out there, sir,
5 with real needs and Indian gaming has brought our
6 people to the point where we're now able to take
7 care of ourselves to the degrees that we've never
8 been able to in the past.

9 But with that being said, and I don't

10 intend to be confrontational, but this is
11 something that's really important to me, and it's
12 coming from the heart, but with that in mind, I
13 truly hope that you are listening to what the
14 folks are telling you today because real lives
15 are at stake.

16 Thank you, sir.

17 CHAIRMAN HOGEN: Thank you, Chief
18 Spicer. Let me just respond to a couple of the
19 concerns you mentioned.

20 Why hasn't the Department of Justice
21 been out there prosecuting cases? Well, I'm
22 sure, you know, the Seneca-Cayugas and others

1 taught them a lesson and they're a little gunshy,
2 but I think they might have been out there with

3 respect to some of the activity, but NIGC
4 encouraged them to participate in our plan; that
5 is, rather than prosecute tribes for criminal
6 violations of the Johnson Act that they
7 perceived, why not let NIGC go forward with an
8 appropriate regulatory scheme?
9 I think they bought into that. Now that may not
10 be the only explanation, but at least I think
11 it's part of a situation.

12 We will very seriously consider not only
13 what's being said today and what has been said
14 today, but what was said to us when we met with
15 over 70 tribes individually.

16 I know that the advisory committee that
17 we established was frustrated that more of their
18 concerns weren't reflected in our proposal and
19 certainly we also did have dialogue with the
20 Department of Justice that fit into the process,
21 but we are listening and we'll do our very best
22 to try and come down at the right place.

1 Chief Ransom?

2 MR. RANSOM: Yes. On behalf of our
3 tribe, thank you for the invitation to present as
4 part of this afternoon's hearing panel.

5 We will be submitting written comments
6 in addition to my testimony today.

7 I think that we're a tribe that has both
8 a bingo hall with Class II games and a casino
9 with Class III games. In addition, one of our
10 tribal members was selected to serve on the
11 Federal Tribal Advisory Committee. I think
12 because of this, we believe we bring a unique
13 perspective to this hearing.

14 I wanted to start by talking about
15 process and basically we're disheartened by the
16 process and the decisions reached by the NIGC in

17 issuing these proposed regulations. I think it's
18 important to point out that the Commission's own
19 tribal consultation policy requires meaningful
20 government-to-government consultation with Indian
21 tribes.
22 How can the Commission claim its

266

1 consultation with Indian tribes is meaningful
2 when it ignores the voices of tribes who keep
3 saying these proposed regulations are over-
4 reaching and contrary to existing law?
5 In addition, I think that you took some
6 pride in pointing out that the Commission sent
7 out over 500 separate invitations to tribes and
8 that it conducted over 300 separate government-

9 to-government consultation meetings with
10 individual tribes, their leaders, our
11 representatives regarding development and
12 formulation of these proposed regulations.

13 However, what's missing is a summary of
14 what the tribes told the Commission about the
15 proposed regulations. Why wasn't a summary of
16 comments made at the numerous tribal
17 consultations and why wasn't that provided as
18 part of the Federal Register Notice for these
19 proposed Class II regulations?

20 I think it's been made clear that the
21 Commission changed the draft regulations to
22 address concerns of the Department of Justice,

1 but we've seen no indication that it has in any

2 way been responsive to concerns identified by
3 tribes.

4 The Federal Tribal Advisory Committee
5 had the potential to help the NIGC promulgated
6 meaningful regulations. However, what value was
7 there in the tribal representatives providing
8 insight, advice and assistance to the Commission
9 when, in the end, the Commission ignored any
10 substantial insight and advice and assistance
11 that these tribal representatives provided?

12 We're concerned that the NIGC's proposed
13 new Class II classification standards and the new
14 definition of electronic or electromechanical
15 facsimile are unnecessarily too restrictive and
16 grossly inconsistent with IGRA, established case
17 law and previous decisions made by the
18 Commission.

19 We strongly disagree that slowing down
20 Class II games and making them unattractive to
21 players is the best or only way to distinguish
22 Class II and Class III games.

1 We believe that uniform standards can be
2 created for Class II games to distinguish them
3 from Class III games. We believe that the
4 Federal Tribal Advisory Committee could be the
5 venue to create these standards and then the
6 standards could then be combined with
7 certification of Class II testing laboratories to
8 ensure that Class II games are timely certified.
9 Instead of crushing technology, the NIGC needs to
10 embrace it and make it work for both Class II and
11 Class III games.

12 We believe much of the challenges of
13 today are because the technology is moving faster
14 than the regulators, but this can be fixed by
15 investing in better trained and more

16 knowledgeable regulators.

17 Our tribe is finding out that Class II

18 games and Class III games can co-exist on the

19 same reservation. Last year when we amended our

20 tribal state gaming compact that allowed us to

21 install slot machines, we were concerned that it

22 would negatively affect the play of Class II

269

1 games. We've since learned that instead, our

2 Class II and Class III gaming facilities are

3 complementing each other. Tribal gaming revenues

4 continue to increase from both gaming facilities.

5 What I can now say, though, is that if

6 the proposed Class II regulations go forward as

7 written, it will eliminate all 300+ Class II

8 gaming devices at our Mohawk Bingo Palace. It
9 will also negotiate the hard work for our Tribal
10 Gaming Commission in ensuring that these devices
11 meet the current IGRA definition of Class II
12 games.

13 More importantly, it will have a
14 devastating effect on revenue and employment
15 contributions made to our tribe. Currently, over
16 one-third of our revenue is generated from Class
17 II gaming. In addition, we employ a 120 people
18 within our Class II gaming facility.

19 Today, we are better able to meet the
20 essential governmental service needs of our
21 tribal membership thanks to gaming. As the U.S.
22 Administration continues to make drastic cuts to

1 domestic programs, we are able to fill much of
2 that gap through tribal gaming revenue. You are
3 about to change that.

4 Therefore, we believe that the NIGC
5 should be required to conduct a study of the
6 economic impacts of the proposed Class II
7 regulations on tribes across the country. We
8 believe that such an economic study will show the
9 devastating economic impacts on tribes who
10 operate Class II games that the proposed
11 regulations will eliminate. The NIGC must
12 consider these impacts from its proposed
13 rulemaking.

14 Thank you.

15 CHAIRMAN HOGEN: Thank you, Chief
16 Ransom. Rogelio Elizondo, and I understand you
17 will be assisted by Rayburn Elizondo, who will
18 interpret your testimony.

19 MR. ELIZONDO: (Through interpreter).
20 I'd like to say good afternoon to Chairman Hogen,
21 Commissioner Choney and everybody here.

1 name is Rogelio Elizondo. I'm a council member
2 of the Kickapoo Traditional Tribe of Texas. I am
3 honored to be here representing my tribe today.

4 Thank you for allowing me to speak on behalf of
5 my tribe.

6 We were seasonal migrant workers and
7 were forced to leave our traditional ways behind
8 while we went to make a living. The casino
9 operation has allowed us not to have to leave our
10 ways while being able to make a living.

11 When Congress recognized that we have
12 the right to have gaming, we were able to
13 generate jobs for our tribal members without
14 sacrificing our traditions. We no longer have to

15 migrate north to earn a living. We have jobs
16 within our reservation. Our children can stay in
17 school all year-round. We are able to provide
18 health services to our tribal members.

19 When U.S. Congress passed the Indian
20 Gaming Regulatory Act, IGRA, it intended our
21 tribe to promote our ability to create a strong
22 government, tribal economic development and

272

1 tribal self-sufficiency. We, the Kickapoo
2 Traditional Tribe of Texas, depend on our Class
3 II gaming facility to achieve those goals.

4 The plan to change the definition of
5 rules under IGRA will have the effect of taking
6 away from our tribe its right to promote our

7 self-determination and would impact much-needed
8 social services to our tribal members.

9 The best option would be that the
10 Commission would withdraw the proposed
11 regulations since the current law provides
12 efficient distinctions between Class II and Class
13 III gaming.

14 But if the Commission decides to go
15 forward, then I make the following
16 recommendations: no restriction on game
17 displays, no restrictions that would slow the
18 speed of play, and to include a provision
19 grandfathering any game already in operation by a
20 tribe that is in the procedures process.

21 The tribe will submit detailed written
22 comments for the record before the deadline.

1 I would like to thank you for allowing
2 us to speak today.

3 CHAIRMAN HOGEN: Thank you. Thank both
4 of you. Chairwoman Vizenor?

5 MS. VIZENOR: Commissioner Hogen,
6 Associate Commissioner Choney, NIGC staff, thank
7 you for the opportunity to testify here today as
8 to the adverse impacts the proposed Class II
9 gaming regulations under consideration by the
10 NIGC will have on my tribe and our members.

11 Indian gaming has been of tremendous
12 benefit to a few tribes, of modest benefit to
13 many tribes. We are one of the tribes who have
14 benefitted modestly from Indian gaming. We are a
15 remote rural Indian tribe with a large tribal
16 population. For us, every dollar counts.

17 We have relatively a large reservation
18 that has been subjected to massive non-Indian
19 land grabs that have greatly diminished our trust
20 land base over the years. In other words, we

21 have a checker board reservation. Because of
22 this, White Earth, with the assent of the NIGC,

274

1 has used all authority available within the four
2 corners of the Indian Gaming Regulatory Act to
3 regulate charitable gaming on our reservation and
4 licensed Class II machines at "offsite" non-trust
5 land locations within the reservation.

6 The bulk of this gaming consists of
7 Class II bingo machines and pull tabs. These
8 machines are very popular and generate
9 significant revenue for our tribe. These
10 machines allow us to regulate charitable gaming
11 at these locations, making even more gaming
12 revenue available to our tribal government.

13 If the NIGC adopts the proposed rule as

14 currently drafted, it will have a devastating
15 impact on our Class II gaming operations. First
16 of all, the games we currently operate will not
17 comply with the new proposed regulations. We
18 will need to replace our current games with
19 different ones. This will come at a tremendous
20 cost to us.

21 In addition, the new games we will be
22 forced to use as replacements under the proposed

275

1 regulations will operate at much slower speeds
2 and the display and entertainment features of the
3 games will be dramatically altered and
4 diminished.

5 Quite frankly, games available under the

6 new regulations simply may not be viable. This
7 significant source of revenue would be lost to
8 the White Earth Tribe.

9 Frankly, we have no idea why NIGC is
10 currently contemplating these regulatory changes.
11 The current set of regulations concerning Class
12 II gaming have been consistently opposed by the
13 Department of Justice. The Department of Justice
14 has frequently sued tribes in an effort to
15 emasculate the current Class II regulations.
16 Every time they have lost.

17 This attack by the Department of
18 Justice, at least two different federal Circuit
19 Court of Appeals have decided that the present
20 regulatory scheme is proper and legal.

21 It appears that what the NIGC is
22 proposing to do is to accomplish through

1 administrative what the Department of Justice has
2 failed to achieve through litigation; that is, to
3 overturn administratively what the federal courts
4 have already confirmed as legal.

5 In other words, Congress has spoken and
6 the courts have definitely interpreted the
7 statute. What we see happening is the NIGC
8 attempting to amend the Indian Gaming Regulatory
9 statute through administrative regulation. This
10 strikes us as very underhanded, indeed
11 unconstitutional, a way of achieving a result
12 that would work to the stunning disadvantage of
13 many tribes.

14 If the NIGC and Department of Justice
15 really feel that the current statutory Class II
16 scheme is not proper and needs to be changed,
17 then let us debate the issue in Congress. Each
18 party with an interest in this issue can make the
19 best case. In this public forum, the best

20 arguments will prevail. This strikes us as fair,
21 more open and even-handed way of resolving the
22 issue than through a regulatory process the

277

1 administration alone decides, and we could be
2 terribly disadvantaged by your decision.

3 These regulations are complex and
4 technical, but this is not a theoretical issue
5 for us. It is real and fearsome. Let me please
6 put it bluntly. Because of the revenues we are
7 deriving from these Class II gaming machines,
8 including offsite gaming, we are able to fund the
9 following three programs, in spite of the
10 continually shrinking federal assistance and
11 contrary to the federal trust responsibility for
12 our lands and members.

13 We fund elderly nutrition, tribal
14 ambulance service, and youth athletic programs.
15 Should the NIGC adopt as final the proposed rule
16 as currently drafted, two of these programs will
17 have to be eliminated. Should you finalize the
18 proposed rule, please help me, advise me as to
19 which of these programs you would cut if you were
20 in my position.

21 Your final decision is that real for us.

22 We hope this testimony helps bring this reality

278

1 home to the NIGC.

2 Thank you for considering White Earth's
3 view on this very important matter.

4 CHAIRMAN HOGEN: Thank you, Chairwoman.

5 We will conclude then with Chairman Mark Macarro
6 from the Pechanga Band.

7 MR. MACARRO: (Indian Language.) Good
8 afternoon, Mr. Chairman and Commissioner Choney.

9 Thank you for the opportunity to testify
10 regarding the efforts of the NIGC to revise the
11 manner in which games are classified under the
12 IGRA.

13 My name is Mark Macarro. I'm the Tribal
14 Chairman of the Pechanga Band of Luiseno Indians.
15 We've been federally recognized since 1882. The
16 Pechanga Indian Reservation is located adjacent
17 to Temecula in Southern California where we
18 operate the Pechanga Resort and Casino. We've
19 been in operation since 1995 and currently, we
20 employ more than 5,000 people.

21 Gaming has clearly become an important
22 source of revenue for both the Band, our local

1 and regional economies.

2 It's for this reason that I'm here today
3 to voice Pechanga's opposition to the
4 Commission's current efforts and we urge you not
5 to promulgate these rules.

6 It's our belief that this rulemaking
7 threatens not only the viability of Class II
8 gaming but in fact all of Indian gaming. One
9 need only consider the events of the last several
10 weeks to see the long-term implications of this
11 rulemaking.

12 For the past several years, a number of
13 California tribes have been attempting to
14 renegotiate our gaming compacts. While our
15 failure to reach agreement has often been
16 characterized in the press as being solely about
17 revenue sharing, in truth, it's been more about
18 attempts by the state to subject the tribes to an

19 unusual degree of local and outside control.

20 Well, after much negotiation recently,
21 at the end of August, a compromise was eventually
22 reached and nonetheless, because of politics as

280

1 usual and because of the influence of a labor
2 union with a history of corruption, we were
3 unable to even obtain a legislative hearing or a
4 vote on our compact.

5 As it stands, we must return to fight
6 another day and we plan to do just that. Getting
7 to this point, however, was not easy and we must
8 ask ourselves where would we be without the
9 alternative of a viable Class II market?

10 If the Commission moves forward with
11 this rulemaking, all existing Class II games will

12 become Class III. While new Class II games will
13 eventually be developed, because of the arbitrary
14 requirements this rulemaking would place on them,
15 these new Class II games will be so slow and
16 cumbersome as to render them unprofitable.

17 Under the existing regulatory scheme,
18 California tribes were able to only negotiate a
19 compact that could be viewed at best as an
20 unbalanced compromise. What will happen when we
21 have no other option? When we have no viable
22 alternative to Class II or Class III gaming?

1 Unfortunately, the state will simply
2 assume that it's only a matter of time before the
3 tribes are willing to agree to its demands,

4 however outrageous they may be. Our leverage
5 will become a thing of the past and tribes will
6 be at the mercy of uncooperative states.

7 It's because of this eventual result
8 that the Pechanga Band strongly opposes this
9 rulemaking. Why does the Commission feel the
10 need to destroy an entire class of gaming? The
11 existing scheme is in line with IGRA. We've
12 heard that several times today. It also models
13 the holdings of the courts and in fact, we
14 understand that the Commission's existing
15 definitions have been upheld by both the 8th and
16 the 10th Circuit Courts of Appeal.

17 The Commission is acting alone here.
18 There has been no court ruling or congressional
19 enactment that supports the NIGC's current
20 actions. The Commission mistakenly asserts that
21 if it does not provide a bright line between what
22 is Class II and what is Class III, Congress will

1 have to step in and eventually put an end to all
2 of Indian gaming.

3 The Commission claims that because of
4 advances in technology, the Act is being
5 stretched, that it's not working as intended, and
6 that Class II gaming is awash with slot machine
7 facsimiles. In reality, Congress anticipated the
8 Class II gaming would grow alongside technology.

9 As has often been noted, Congress
10 intended that tribes have maximum flexibility to
11 utilize Class II gaming for the purposes of
12 economic development. Technology is never
13 intended to limit the commercial success of a
14 product or an industry.

15 I challenge you to point to just one
16 industry where the addition of technology was
17 intended to hinder its development.

18 The bottom line is that there is no
19 congressional intent that Class II gaming not be
20 profitable.

21 Interestingly, it's only the Commission
22 and the Justice Department, for that matter, that

283

1 seems confused by the distinctions between Class
2 II and Class III games. The courts understand
3 these differences and believe me, so do our
4 customers.

5 For some reason, however, the Commission
6 now wishes to require that Class II games be
7 visibly different from those that are Class III.
8 This ludicrous conclusion clearly is devoid of
9 any credible analysis, legal, industry-based, or
10 otherwise.

11 IGRA does not require that a player be
12 able to discern between the two immediately upon
13 approaching the games, and the courts have said
14 as much. To place such a requirement on Class II
15 gaming is simply ridiculous and perhaps more
16 importantly, it frustrates the intent of IGRA.

17 If, however, the Commission is so
18 concerned with the outward appearance of the
19 games, then simply require us to put a sign on
20 them and be done with it. Remove all other
21 arbitrary requirements from the regulation.

22 The Commission has produced no evidence

1 that the general public is confused or at risk.

2 There's no justifiable reason to restrict the

3 flexibility Congress so clearly intended.

4 Returning to the Commission's claim that
5 if they do not act, Congress will, I would argue
6 that the Commission is saving Congress the
7 trouble. By decimating the negotiating power of
8 tribes, it is only a matter of time before tribal
9 state compacts are a thing of the past and I
10 would add that if the Commission is so concerned
11 with provisions of the Act that are not working
12 as intended, why is not actively pursuing a
13 seminole fix? Why is the Commission not seeking
14 an expressed exemption to the Johnson Act for
15 technologic aids?

16 Respectfully, I believe that the
17 Commission's time would be better spent restoring
18 the balance Congress so clearly intended when it
19 enacted IGRA than by placing arbitrary
20 restrictions on Class II gaming.

21 At the very least, the Commission should
22 avoid unwarranted efforts that tilt this balance

1 even further away from the tribes and toward the
2 states.

3 We heard a panel today. In my head, I
4 have referred to that as the "red flag panel."
5 It had two individuals who were advocates of the
6 states' interests, and I would submit that they
7 love your proposed regulations.

8 Why? We should ask ourselves why did
9 Tom Gede and the woman from Washington State love
10 these regulations? I'll give you one answer.
11 It's because these proposed regs jam us tribal
12 governments, weakens our tribal decisionmaking
13 prerogative and takes away our leverage. That
14 alone, that double red flag warning alone should
15 be enough reason to not promulgate these
16 regulations because it is not going to serve

17 tribal interests.

18 Again, I'd like to thank you for the

19 opportunity to provide our views on the

20 Commission's current endeavors and I'm happy to

21 answer any questions you may have.

22 CHAIRMAN HOGEN: Thank you, Chairman

286

1 Macarro.

2 (Applause.)

3 Final Public Comments

4 CHAIRMAN HOGEN: Are there public

5 comments or questions with respect to the

6 testimony of this panel? Yes, sir?

7 MR. ENYERT: Good evening. My name is

8 Charles Enyert. I'm the Chief of the Eastern

9 Shawnee Tribe, and I want to thank you for

10 letting me be able to make some comments.

11 I would first like to read a statement

12 and then I would like to share with you some

13 observations that I've had from this meeting

14 today.

15 Like George Tiger, I like to listen and

16 I have saved my comments to the very end because

17 I wanted to hear all the panels.

18 So, first, the statement. The NIGC's

19 proposal for Class II classification standards

20 and definition invade tribal sovereignty.

21 Indian tribes are sovereign entities

22 with tribal governmental powers that are

2 government. The Indian Gaming Regulatory Act, 25
3 USC 2705(b)(1), recognizes Indian tribes as
4 sovereign nations and determines the tribes are
5 the primary regulators of Indian gaming.

6 The NIGC proposed regulations exclude
7 tribal governments from participating in the
8 classification of games and allows independent
9 game testing laboratories that are subject to
10 NIGC oversight to make legal determinations
11 regarding the classification of games. If we did
12 that in a tribe, we would say we have a conflict
13 of interest, is what would be thrown out at us.

14 Tribal governments would be prohibited
15 from creating their own testing laboratories nor
16 could tribal regulators approve the placement of
17 games on casino floors without the approval of an
18 NIGC-controlled lab. Each of these proposed
19 regulations invade tribal sovereignty and the
20 inherent right of tribal governments to exercise
21 authority over internal tribal affairs.

22 These proposed regulations grant the

1 NIGC the authority that simply does not exist
2 under federal law.

3 Now, some of my observations today.

4 Like I said, I waited till the very end and,
5 please, if I have missed something, please
6 correct me.

7 One of the things I have observed, that
8 not a single Indian nation today has said they
9 were in favor of the regulations. Am I correct
10 on that? I have not heard one single Indian
11 nation be in favor of it.

12 I did hear some states that are in favor
13 and that's already been talked about, how they
14 would profit from this, your proposal, and I'd
15 just like to share a couple comments I have heard

16 today, and these are not my comments. All right?

17 One of the comments I heard, that they
18 feel that the public hearings are a way for the
19 NIGC to say that they met their obligations to
20 have consultation with the Indian nations. Some
21 feel that you listen but you don't hear. We ask
22 you today, hear what we're saying, take it to

289

1 heart. This is a very important thing to the
2 tribes.

3 Everything in your proposal, and I'll
4 just name a few, has an impact on Indian
5 programs, such as economic development, health
6 care, tribal social programs, housing, jobs not
7 only for tribal members and non-tribal members,
8 tribal self-sufficiency, self-determination, law

9 enforcement, elders programs, and I can go on and
10 on. It affects every one of them because it
11 affects the income that we have coming in to the
12 tribes.

13 As a small tribe, it is very important
14 that the revenue, the profits on our gaming, keep
15 coming because this is what goes back into our
16 tribe. This is what goes back to our tribal
17 members through educational programs and other
18 programs that I have mentioned.

19 So, I ask you, please, don't just
20 listen, hear what we're saying.

21 CHAIRMAN HOGEN: Thank you.

22 (Applause.)

1 MR. STRAUS: Kevin Parker, Stillaguamish

2 Tribe.

3 Sir, you mentioned earlier for us to

4 read the preamble. Actually, we had. In your

5 own preamble, you stated that the tribes strongly

6 disagree -- the panel that was put together, I

7 believe Chief Ransom's tribe was part of that, I

8 know the Melvin Daniels and the Muckleshoot Tribe

9 was also part of that.

10 You stated they strongly disagree with

11 the decisions made by the Commission regarding

12 auto-daubing, time delays, advocating authorizing

13 wholly electronic pull tab games, as well as the

14 tribes asking that no changes to the current rule

15 definitions of electronic or electromechanical

16 facsimiles of games of chance be made.

17 Sir, Mr. Daniels let me know and I'm

18 kind of speaking for him, he wasn't able to make

19 it out here. He wanted me to point out that you

20 folks took nothing substantial that they brought

21 up and brought it to the table. So, he felt like

22 it was a waste of time on his part. I hate to

1 put -- I'm sure that he would put it more
2 eloquently than I do, but that was his point.

3 Further, your preamble states that the
4 Commission is bound by Congress's intent as
5 expressed in IGRA to promulgate rules that
6 clearly distinguish technological-aided Class II
7 games from electronic or electromechanical
8 facsimiles of any games of chance.

9 Whereas we appreciate that, everyone has
10 come up and let you know that we understand that
11 you feel like something needs to be done. We'd
12 like to help you in that. We'd like to work
13 together with you. I think the vendors, the
14 tribal leadership, the operators, the gaming

15 commissions would all like to help you in this.

16 Sir, I almost feel like what's going to
17 happen before the ink is dry on the Federal
18 Register, lawsuits are going to be issued. To
19 me, that is such a waste of money that can be
20 spent on tribal programs, elder care, youth
21 services, and to me, it's such a waste.

22 I mean, every one of these tribes that

292

1 have come up today have told you, sir, please
2 stop, stop and think about what's going on. I
3 mean, we understand that you're trying to do the
4 right thing and no one faults you for that,
5 either one of you gentlemen. It's just if you'd
6 stop and listen to the folks who were here.

7 The last learned gentleman brought up a

8 good point. Only two people agreed with you all
9 day and that was the State of Washington and also
10 the Attorneys General Representative and that
11 should be cause for pause right there.

12 Thank you.

13 CHAIRMAN HOGEN: Thank you.

14 (Applause.)

15 CHAIRMAN HOGEN: Yes, sir?

16 MR. BOON: Good afternoon, Chairman
17 Hogen, Mr. Choney.

18 Doug Boon, CEO, Little Creek Casino,
19 Squakin Island Tribe.

20 I just wanted to make a quick point,
21 that I guess probably the same thing that's been
22 said by my two colleagues before this. It's a

1 little difficult for me to go back to the tribe
2 that I represent and that I work for to say that
3 this trip that we took down here to come here and
4 testify at this hearing has been meaningful
5 knowing that during this entire process and this
6 entire time, you have been getting the same thing
7 that we're talking about today from all the
8 tribes that you visited and all that you spoke
9 with as well as from the committee that was
10 formed to help form these rules and regulations.

11 I do hope very honestly that you listen
12 to what we have to say and you hear what we have
13 to say and that you take that to heart and that
14 you would make those changes to these proposed
15 regulations that need to be done because it is
16 sincerely my fear that this is just going to make
17 matters worse if it does not and that it's going
18 to create a much larger issue within Indian
19 gaming and for all of us as tribes.

20 The issue isn't money, that's not what's
21 at hand, and the issue is people's lives, and I

22 hope that you do hear that.

294

1 Thank you.

2 CHAIRMAN HOGEN: Thank you.

3 MR. BATTIN: My name is Jim Battin. I
4 am a California State Senator, and I wanted to
5 give another perspective, I guess, from the state
6 side since the people who have represented
7 themselves as representing their states certainly
8 have acted in favor of your proposed regulations.

9 I, for the last 12 years, have been a
10 member of the California State Legislature. I
11 represent Southern California. I represent
12 Riverside County. I have several gaming tribes
13 in my area. I have been involved in the issues

14 in California from the very beginning in terms of
15 the ratification of the 1999 compacts. I was the
16 author of the bill that ratified them.

17 I give you all this background because I
18 want to make the point that it seems like this is
19 a solution looking for a problem.

20 I live in the world where we have a
21 concentration of tribal casinos. My constituents
22 are very clear to me when they talk about why

295

1 they go to an Indian casino, what they're looking
2 for. It's entertainment. They frankly don't
3 know nor do I believe they care if it is a Class
4 II or a Class III machine. They're there because
5 they want to go there and have fun. That's why
6 the entertainment industry and gaming in the

7 United States is so successful. That's why it's
8 so popular around the country. That's why it's
9 so successful in Southern California.

10 They do not care that it is Class II or
11 Class III, and I do not understand why the
12 Commission would want to then try to take away
13 something from the tribes trying to provide a
14 product to their consumer, unless Chairman
15 Macarro hit it right on when he said it's just a
16 point of leverage.

17 In California, because of the compacts
18 that were signed in 1999, there is an arbitrary
19 2,000 machine cap. The biggest complaint I get
20 from my constituents about slot machines in my
21 district is that they can't get on one. They're
22 tired of waiting half an hour on a weekend

1 because they just can't get on one, and
2 unfortunately, they actually blame the Indians
3 for it because they don't understand that the
4 government has imposed this on them.

5 In California, we have negotiated with
6 the tribes and the governor to allow for more
7 machines because the public is demanding it.

8 The leverage point that the tribes have
9 was to say we are going to use our right to go to
10 Class II gaming unless you will negotiate in good
11 faith which the law requires and we want to meet
12 you, you meet us, and indeed that's exactly what
13 Governor Schwarzenegger did.

14 Around the country, there may be
15 different situations, and I can only speak to
16 California, but the fact of the matter is I don't
17 understand the necessity for this regulation. I
18 don't understand why we're looking to complicate
19 a very vital and growing industry.

20 One of the -- well, in California, the

21 biggest employer in terms of growth, positive

22 growth, is entertainment, is gaming, Indian

297

1 gaming. It is no mistake that the area I
2 represent is on fire with our economy. It's no
3 mistake that the tribes that are my constituents
4 also are one of our best neighbors and provide
5 tremendous benefits to the community, from
6 donating things to the local police and fire, to
7 the local non-profit organizations, to saving
8 hospitals, to coming to aid when there are
9 disasters, like when California catches on fire,
10 they're there always, and that money is coming
11 from Indian gaming.

12 To complicate it, I think this is just

13 unnecessary, and I wanted to give you just more
14 of another state's perspective because as a state
15 representative, I understand that our U.S.
16 Constitution tells us that we have to respect the
17 tribes as a partner, as one of the three branches
18 of government that are named in our Constitution,
19 that the state and the federal government and the
20 tribes, and that it is just not right to try to
21 give the state a leverage on something that is
22 beneficial for all.

298

1 Thank you.

2 (Applause.)

3 CHAIRMAN HOGEN: Thank you. Mr. Green?

4 MR. GREEN: My name is Jess Green. I'm

5 a Chickasaw Indian, but I'm also an attorney, and

6 I've been fortunate enough on behalf of Chief

7 Spicer to do two litigations for the Seneca-

8 Cayuga Tribe.

9 I come from a rural background and

10 growing up, there were lots of fences built to

11 keep things out. When IGRA was passed in 1988,

12 there was a fence erected in Class III that kept

13 us out of Class III, but there wasn't a fence

14 built around Class II gaming because we were

15 using our inherent sovereignty. We don't need a

16 fence.

17 CHAIRMAN HOGEN: Thank you, Mr. Green.

18 (Applause.)

19 MR. REID: Morris Reid from Chukchamsi,

20 Picayune.

21 I'd just like to say this. With this

22 change to our amendment that would indirectly

1 amend IGRA through a back door move by DOJ, the
2 elimination of the good intentions of the
3 Congress to Indians and with this elimination
4 would come the elimination of economic prosperity
5 for the tribes. It would eliminate the
6 permitting tribes to embrace technology
7 advancements. It would eliminate economic
8 development, self-sufficiency, stronger
9 governments, sovereignty, and leverages in
10 negotiation in good faith with states.

11 It would also eliminate the federal
12 court decisions, NIGC regulations and
13 congressional legislation history that provided
14 that Johnson Act does not apply to Class II
15 gaming.

16 Thank you.

17 CHAIRMAN HOGEN: Thank you. We have the
18 panel present, but we also have the public
19 comment period, and I think maybe rather than

20 keep the panel here throughout that public
21 comment period, we will thank them very much for
22 the impressive testimony you offered, and we will

300

1 continue with the public comments. Thank you.

2 (Applause.)

3 CHAIRMAN HOGEN: Are there further
4 questions of the Commission or comments with
5 respect to the proposal that's under
6 consideration? Yes, ma'am?

7 MS. SWANSON: Hi. I'm Shana Swanson
8 from the Stillaguamish Tribe of Indians, and I
9 know that you've heard a lot from our tribe.

10 I personally would like to thank all the
11 people that came here to put forth their

12 opinions, facts and feelings on the proposed NIGC
13 changes. Most of what we have heard today has
14 been in opposition of these changes.

15 We from the Stillaguamish Tribe in
16 Washington State strongly urge that the
17 Commission consider what has been said today and
18 not to make this trip a waste of time and assets
19 of the tribal people.

20 Thank you.

21 CHAIRMAN HOGEN: Thank you.

22 (Applause.)

301

1 CHAIRMAN HOGEN: Joe?

2 MR. WEBSTER: Mr. Chairman, in light of
3 the comments today, I think there's certainly a
4 lot of reasons that have been expressed that

5 would justify withdrawing the current proposal.

6 However, at the very least, in light of
7 the comments made, the concerns raised, and the
8 request that you've made for specific suggestions
9 on aspects of the proposal, I wonder if the
10 Commission might be willing to agree to at least
11 extend the deadline period for the current
12 proposal.

13 CHAIRMAN HOGEN: When we finish the
14 hearing today, we will convene and we will decide
15 how we're going to proceed and that will be, I
16 guess, a suggestion that we will consider.

17 Yes, sir?

18 MR. MATHIAS: (Indian Language.) My
19 name is Reuben Mathias. I'm from the
20 Confederated Salish and Kootenai Tribes of
21 Montana.

22 On behalf of my people, I come forward

1 to you to ask you not to do what you're trying to
2 do because it's going to devastate a lot of
3 people, especially in the ways of the economy
4 stuff.

5 Also, you're infringing on our rights as
6 sovereign people. You're trying to take away
7 some things that you shouldn't be. You know, I
8 sat in here all day thinking about these things
9 and looking at these walls and wondering how many
10 tribal people have come in here to state their
11 case amongst the United States Government and the
12 senators and all this, how many times they've
13 been in here and how many times are we going to
14 be in here in the future.

15 What other way are you going to think
16 about that's going to hurt us as you go through
17 life? You know, us people, Indian people, we
18 don't do that. We sit there and we look to our

19 seven generations to come to find out what we're
20 going to have here.
21 What we have here today in our Indian
22 Country has been given to us by our forefathers

303

1 that have prayed and begged, fought and died for
2 us, shed blood in this country and abroad on the
3 other side of the ocean. This is what we're all
4 about here, is about our future, not about today.
5 Our day today is done. It's about tomorrow when
6 we have to start praying hard to find out what
7 our children are going to have. That's what
8 we're talking about, our Indian sovereignty
9 rights.
10 We have the right to control our own

11 people. We have the right to watch what they're
12 doing. We're not people that are going to go out
13 and become mobsters and things like that. We're
14 not that kind of people. We don't treat
15 ourselves that way. We don't steal. We don't do
16 those kind of things, and I hear this coming that
17 we're being accused as criminals because we're
18 taking up some bingo parlor or some casino that's
19 going to advance my people into certain areas of
20 lawyers or medicines or things like that that
21 you're not looking at, and our educational
22 system.

304

1 You talk about our Indian children who
2 don't have an education, who can't get an
3 education because the tribes can't afford it, and

4 we look to the government, the United States
5 Government and they turn us away just as fast as
6 they can.

7 These are the things that you need to
8 look at, sir. I'm very happy that you're doing
9 this, bringing this up, because we gotta put a
10 stop to you, you know.

11 (Laughter.)

12 MR. MATHIAS: We gotta put a stop to
13 you. I hope when you go home tonight and you sit
14 down and you look at your grandchildren and you
15 look at them and you look at me and you tell me
16 where your heart is at. This is what I just want
17 to share with you.

18 CHAIRMAN HOGEN: Thank you. Let me
19 share --

20 (Applause.)

21 CHAIRMAN HOGEN: Let me share a few
22 things with you and the group.

1 I do think of my grandchildren. I have
2 a grandchild, a beautiful granddaughter. If I
3 could wave the wand, I would like the structure
4 to be such that all programs were fully and
5 adequately funded for tribes and Indian people,
6 but that's not the job they gave me nor do I have
7 the resources at my disposal to do that.

8 If every decision I could make was so
9 that tribes could make more revenue, I'd have the
10 best and easiest job in Washington. We are
11 tasked with ensuring that there is integrity in
12 Indian gaming, and most of the time, if we can,
13 when we deal with tribes, whether it's on
14 background issues or contract issues or
15 classification issues, if we can, we say yes, and
16 if it's not right, we try to say can we help you
17 fix it?

18 But there are other things we have to
19 say no, say no, you've done that wrong, no, you
20 have to fix that, and if you don't, we'll impose
21 a penalty, not because we want to keep anybody
22 down, but we want to ensure that integrity in

306

1 this marvelous industry that has blossomed since
2 the passage of IGRA in 1988.

3 It's been suggested that we're coming up
4 with a solution here in search of a problem. We
5 have a problem. We issued some advisory opinions
6 because there was a desperate need to try and
7 give guidance to what would be accepted in view
8 of the Johnson Act, in view of the language of
9 IGRA, as to what could be permissible on Class II

10 floors, and it was really difficult because there
11 was not that clear guidance.

12 There was this conflict between yes,
13 Class II can use computers and electronic and
14 technologic aids. No, you can't become an
15 electronic facsimile of a game of chance.

16 We had proposals come to us where the
17 game played bingo, but there was really no
18 significance to winning the bingo game. It was
19 just a pretext to get into a pool to see what
20 prize you won and that crosses the line. That
21 becomes Class III gaming.

22 It's been suggested we're going to

1 eliminate what the courts have ruled. We're
2 trying to build on what those cases involving the

3 Mega Mania and the Lucky Tab II decisions set
4 down, that they set out some guidance, and, you
5 know, the game that was permissible took two
6 minutes to play, had to have a dozen people to
7 play, and we've come up with a set of rules that
8 says you can play with two people and you can
9 play it in eight seconds. I don't think that's
10 eliminating those decisions.

11 I think there's a need to do this, and I
12 don't know that we've charted the perfect course
13 or the best course, and we're certainly going to
14 study very carefully, very hard what has been
15 said and what has been sent to us and what will
16 be said and sent to us.

17 But, you know, it's with my
18 granddaughter in mind and, you know, those folks
19 back at Pine Ridge that so desperately need a
20 step up, a way to broaden the economic
21 opportunity, but we've got to keep the industry
22 strong and viable and keep integrity in it and

1 give the folks in Congress and the public the
2 confidence they need to keep this going.

3 So, sir, I don't take lightly, you know,
4 the responsibility that we have, and I will be
5 thinking about the folks at Salish and Kootenai
6 as well as we try to get to the right place.

7 MR. MATHIAS: Thank you for that, but I
8 got one more comment to say, is that I'm new at
9 this political game, but I'm old at the spiritual
10 ways of life with my tribe because I've been
11 elected to that position.

12 What I want to say to you is that with
13 all this money that's been spent on me traveling
14 from here to New York, to wherever else these
15 meetings are, I could have probably fed about 20
16 to 40 people in that time, you know, and I just

17 want you to understand that these travels have
18 cost us a lot of money to come to speak to you
19 and to tell you no, we don't want these things.
20 I hope you put that into consideration
21 because it's really hard for us as Indian people.
22 It's hard for us people, you know, our community

309

1 that we have, our casino, we only have 40
2 machines. It's way smaller than the rest of
3 these. We're just starting with these machines
4 that we're trying to develop and what we've done
5 with that money is we've given quite a bit to the
6 communities out there.

7 So, I just want to let you know, even
8 though we're a small casino tribe, but we're a

9 big land-based tribe with a lot of land, but
10 we're cutting our trees down. Pretty soon, we're
11 not going to have that kind of resources to help
12 fund our programs and stuff. So, we want to try
13 to depend on what's going on today for looking
14 towards the future.

15 I mean, this is the way the Indian
16 people are. We adapt and we adapt pretty darn
17 good and we want to keep doing that, and we don't
18 want to have this good confrontation or whatever
19 you want to call it between government-to-
20 government. That's what we want. We want to
21 have respect. You want respect from us, give us
22 the respect that we want, too. Look at us as

2 CHAIRMAN HOGEN: Thank you. Further
3 comment?

4 MS. JACKSON: Good afternoon, Chairman,
5 Vice Chairman.

6 My name is Tina Jackson. I'm the
7 Chairperson for the Soquemish Tribal Gaming
8 Commission. I'm here as the primary regulator
9 for gaming on the Soquemish Reservation, and as
10 the primary regulator, I wanted to mention that
11 we haven't had a problem with defining Class II
12 and Class III games.

13 We don't have a gray area or a blurry
14 line of what is a Class II and a Class III game,
15 and we have been doing a good job of being the
16 primary regulator for the Soquemish Tribe, but we
17 haven't had any consultation in this.

18 As the three regulating entities that
19 run gaming, federal government, the tribes, and
20 the states, we weren't consulted in this process.
21 We didn't work together as a team or as equal
22 entities in this, and so I feel that as a

1 regulator, that we haven't been given the voices
2 that we needed in this regulation to help
3 regulate this.

4 So, thank you.

5 CHAIRMAN HOGEN: Thank you.

6 MS. HAMEL: Good afternoon. First of
7 all, I just wanted to ask a question. I heard
8 you, Mr. Chairman, talk about economic study that
9 NIGC has begun, and I actually thought that they
10 were on the agenda.

11 Where are you at in that process, and
12 when will we have some answers to some of these
13 questions that have come up today concerning the
14 economic analysis?

15 CHAIRMAN HOGEN: The Commission has

16 contracted with an entity that is trying to get
17 its hands around the numbers that are out there,
18 and as you know, they're not always readily
19 available inasmuch as that's proprietary
20 information.

21 NIGC does have total revenue figures
22 from all the tribes by virtue of the annual

312

1 audits that are received, but that information
2 doesn't have to be and ordinarily is not broken
3 down with respect to Class II/Class III.

4 One of the challenges we have in trying
5 to do an economic analysis is do we just look at
6 what's going on now and what we think would
7 happen if these rules would go into place or do

8 we look at the proposition that what is going on
9 now, at least in some places, is beyond the pale,
10 constitutes illegal Class III gaming, and if that
11 is true, what consideration do we give to those
12 numbers, and so we're trying to come up with
13 something that's meaningful.

14 A challenge to me, and I'm trying to
15 gather information in this connection but not
16 finding as much of it as I would like, I know
17 that when folks go to the casino, go to the bingo
18 hall, they ordinarily have some idea of how much
19 they're going to spend, how much they're going to
20 lose before they go home.

21 I guess it's not accepted by me yet that
22 if a machine plays five times faster, that those

1 people would necessarily spend or lose five times
2 more dollars and so for that reason, I want to be
3 sure that I have confidence in whatever the
4 relationship is between speed of play and the
5 amount of revenue that would be generated.

6 So, I originally thought we might be
7 able to make a presentation at this juncture here
8 at the hearing, but we just haven't got enough
9 information that we have enough confidence in nor
10 have we studied it long enough.

11 So, obviously we've got a point in time,
12 the 30th of September, set as an event, end of
13 comment period. Whether that information will be
14 available by then or not, I don't know. I doubt
15 if it will be done by then, but hopefully not
16 long thereafter.

17 MS. HAMEL: Okay. Well, I guess just by
18 that, because I seen that they were on the agenda
19 and they did not present today, just by that
20 alone and with you not having those answers, it
21 seems to me that that would be reason enough to

22 look at extending the deadline. That was just

314

1 the first comment that I had to make.

2 I'm here today. My name is Jami Hamel.

3 I am the Chair of the Montana Tribal Gaming

4 Association in Montana. I'm also a member of the

5 Confederated Salish and Kootenai Tribes, and I

6 was the past Vice Chairman of the Confederated

7 Salish and Kootenai Tribes. I served as Vice

8 Chair for four years and served on the Council

9 for eight years, and currently, I'm the Senior

10 Policy Analyst for the tribes.

11 So, I come from the different

12 perspectives of a tribal leader, as somebody that

13 works for the tribes, and as a leader for all of

14 the tribes in Montana, and I know, Mr. Chairman,

15 that you've heard me before.

16 I have followed these meetings. I am

17 lucky that my tribe has some money that they send

18 me to these different meetings to listen and to

19 keep track of what's going on. Many of the

20 tribes in Montana don't have that opportunity.

21 They don't have the economic revenue. They don't

22 have the resources to send their people, and I

315

1 was really disappointed when the Montana Tribal

2 Gaming Association sent you a letter requesting

3 that you come to Montana. It wasn't the first

4 request. It was a formal request by the

5 Association, but it was not the first request

6 that had been made by the tribes in Montana, and

7 I was disappointed that we were again denied.

8 Over the past couple of years, as this
9 issue has been talked about, I have went to every
10 meeting and I've made comments, and I know that
11 the request has been made to please come to
12 Montana. I've tried to explain the political
13 landscape that is currently in Montana.

14 The seven tribes that are in Montana are
15 really afraid of the gaming issue. They're
16 afraid to be associated because they're afraid
17 that their federal recognition would be impacted
18 by that and that's a sad thing, that a tribe has
19 to be afraid of that.

20 But all of the tribes in Montana have
21 joined together in a united effort on the issue
22 of gaming because the tribes in Montana

1 understand that we are never going to get rich on
2 gaming in Montana. The political landscape has
3 never been favorable to tribes in Montana when it
4 comes to the tribal state compacts.

5 We have currently and have always had
6 the worse compacts in the nation. We look at all
7 of our brothers and sisters doing well in Indian
8 gaming and Montana tribes are way below that.

9 We cannot compete politically or, more
10 accurately, financially with the Montana Taverns
11 Association. They kind of run the show in
12 Montana. They support the legislators in Montana
13 and the state has no intentions now, and I don't
14 think ever, to negotiate in good faith, and as
15 some of the previous speakers have said, you
16 know, the Seminole decision has eroded that for
17 us to get the states to negotiate in good faith.

18 The state and the non-Indian gaming
19 facilities in Montana continue to benefit at a
20 rate that is outrageous to all of the tribes in

21 Montana, and I'll just give you an example of
22 Class III machines that are in Montana. There

317

1 are 17,000+ Class III machines that are operated
2 by the State of Montana and non-Indian operators.
3 There are less than a thousand for all seven of
4 the tribes in Montana. Just financially, you can
5 see the disparity. It's not right when the
6 intent for Indian gaming was supposed to benefit
7 tribes. It does not benefit the tribes in
8 Montana. It never has.

9 Class II has been the only leverage that
10 tribes have looked at to, you know, look at that
11 disparity within gaming that currently exists in
12 Montana, and these proposed regulations destroy
13 the only chip that the tribes in Montana held

14 when they sat at the negotiation table across

15 from the State of Montana.

16 Class II has been the only viable

17 economic avenue that tribes could utilize, some

18 revenue that they could use to provide for just

19 the basic needs of our people.

20 NIGC has a trust responsibility to

21 promote tribal economic development, tribal self-

22 sufficiency, and strong tribal government. In

318

1 Montana, this is not the case because Class III

2 benefits the non-Indians.

3 So, I'm asking that you please allow the

4 opportunity for Class II economic benefit to

5 tribes by withdrawing the current proposed

6 regulations. Instead of fearing the potential of
7 what might happen, you should be proud and revel
8 in the fact that tribal gaming commissioners do
9 their job.

10 Indian gaming is a very regulated and
11 well-maintained business. Tribal integrity is
12 strong. Please allow tribes to continue to exert
13 their sovereign right to have gaming as an
14 economic opportunity to serve the needs of our
15 people.

16 Thank you.

17 CHAIRMAN HOGEN: Thank you.

18 COMMISSIONER CHONEY: For your
19 information, --

20 (Applause.)

21 COMMISSIONER CHONEY: -- ma'am, we're
22 coming out to Montana on November 3rd.

1 MS. HAMEL: Thanks.

2 MR. McWATERS: Chairman Hogen, my name
3 is Randy Mcwaters. I'm Quapaw from Quapaw,
4 Oklahoma, member of the Business Committee and
5 Game Incorporation.

6 I have been like everyone else. There's
7 a lot of Indian brothers and sisters here today
8 that has voiced their opinion and I was listening
9 to the young man that was up there speaking in
10 his native tongue, voicing his opinion. I was
11 talking to a gentleman back in the back, talking
12 about a code talker during World War II, Charlie
13 Tagbiddy.

14 Many people in this room knew Charlie
15 Tagbiddy. He helped win the war for Native
16 Americans. This young man up here had an
17 interpreter. I was watching your face as he was
18 talking. You didn't know what he was saying.

19 It is our endeavor to help the Indian

20 people for what we're trying to do, for the
21 integrity of the Indian people. As our code
22 talker did, this young man was our code talker,

320

1 and I'd appreciate you listening to us.

2 Thank you.

3 CHAIRMAN HOGEN: Thank you.

4 MR. DECKER: Good afternoon, Mr.

5 Chairman, --

6 CHAIRMAN HOGEN: Good afternoon.

7 MR. DECKER: -- Commissioner Choney,

8 NIGC staff.

9 My name is Daniel Decker. I'm a member

10 of the Confederated Salish and Kootenai Tribes,

11 partner in Decker and Katenai Law Firm, actually

12 here today on behalf of the two clients, Santa

13 Rosa Rancheria Tachi Yokut Tribe in Central
14 Valley, California, and Confederated Salish and
15 Kootenai Tribes of the Flathead Nation of
16 Montana.
17 I was asked by the Chief of the Santa
18 Rosa Rancheria and Tachi Tribe, Clarence Atwell,
19 Jr., to please deliver a message on his behalf at
20 this hearing, and I would be remiss not to do
21 that. So, the first part of my comments will be
22 concentrated on what Chief Clarence wanted to

321

1 convey.

2 Part of what his concern in terms of his
3 understanding of the regulations, they started
4 gaming nearly 25 years ago with bingo, like other

5 tribes in California. The backbone of their
6 gaming industry is Class II gaming. That's what
7 provided them the foundation. That's what
8 provided them the leverage in terms of their
9 compacting. It was that they had viable gaming
10 operations going without the Class III
11 operations. That certainly helped them leverage.

12 Part of the Chief's concern is that
13 other tribes in California have the same
14 opportunity, they have the same leverage that
15 they were once afforded and part of it is his
16 concern of when the 99 California compacts come
17 to an end, what remains, because without
18 leverage, they get held up by the states.

19 His feeling was that he feels like the
20 federal government has been remiss in their
21 responsibilities because the federal government
22 has turned their heads aside when states insist

1 on revenue-sharing when the law itself says that
2 Indian gaming revenues cannot be taxed.

3 When you've got a sliding percentage,
4 whether it's gross revenue or net revenues, if it
5 looks like a tax and smells like a tax, I guess
6 it's a tax, but we all look aside from what the
7 states have done because of their failure to
8 negotiate in good faith, their failure to live up
9 to the deal that Henry Buffalo talked about
10 earlier today, their failure to be willing to
11 waive their immunity to sue and test the good
12 faith issue in favor of them being able to take
13 the revenue from tribal game revenues that are
14 sadly needed by the tribes.

15 The Chief was concerned that the federal
16 government hasn't lived up to that responsibility
17 as we've heard earlier, but part of his bigger
18 concern was that Class II has to remain

19 economically viable for tribes. He feels that
20 the proposal that's on the table will not do
21 that, that just as Indians are like white-tailed
22 deer and we adapt with the times, so should we be

323

1 allowed to adapt our gaming opportunities with
2 the technology to keep the customer happy.
3 The industry has told us and Chairman
4 Macarro, I liked his solution. Let's put a Class
5 II sign on the machine and keep going. The
6 industry is there to provide entertainment.
7 Tribes are being successful at that. It more
8 looks like tribes are being penalized because
9 they're being economically successful.
10 Chairman Atwell made a very good
11 statement. He said 25 years ago, where was

12 California when I had multiple families still at
13 home? Where was California when we didn't have
14 good drinking water? Where was the federal
15 government when we didn't have good drinking
16 water? Where were they with their assistance
17 when we didn't have good sewer systems?

18 Today, the tribe has a 150 new homes,
19 sewer and water, education facilities, a new
20 health clinic, new schools that they've done in
21 the past three years. They've built a new
22 community facility for the youth. They've

324

1 contributed to youth programs. They have a
2 scholarship program for tribal youth where they
3 can virtually go to any institution where they're

4 accepted. They've contributed to the local law
5 enforcement. They've contributed to the fire
6 departments, and they've contributed to the local
7 economy and communities far beyond what the
8 agreement was with the State of California.

9 They share their revenue and tribes
10 spend the revenue on services needed by all of
11 the reservation community and their neighbors.
12 It's not like Donald Trump. It's not like Steve
13 Wynn where they put the profits in their pocket.
14 Tribes spend it on the local communities.

15 Chief Atwell's main part of his message
16 was Class II needs to remain economically viable.
17 Why tax tribes because they're being successful?
18 Why take away that leverage and allow the states
19 to continue to hijack tribes not only in
20 California but other states? They're able to do
21 that because we can't sue them for bad faith
22 because they won't waive their immunity to suit.

1 They won't keep the deal that was made in 1988.

2 In Montana, we've got a bit of a
3 different story. With the Salish and Kootenai,
4 as has been explained, demographics are totally
5 different. The rural economies, a lot fewer
6 people, but gaming is still viable. They're
7 talking about communities where one of the most
8 economically-successful tribes in Montana, Salish
9 and Kootenai, has an unemployment rate of 45
10 percent.

11 An economically-viable operation in
12 Montana might be purely employment alone and
13 Class II gaming is providing that opportunity.
14 We're seeing some exciting new developments in
15 Montana where we never thought possible before
16 with really isolated reservations where people
17 are coming to play the game because it provides

18 entertainment that they can't get elsewhere in
19 the state, but it's a Class II opportunity that
20 those customers are enjoying. It's a Class II
21 opportunity that will cease to exist if your
22 regulations go through.

326

1 It's in the areas that need that
2 economic viability the most, where there's rural
3 isolation, where the state won't negotiate in
4 good faith, where the state is unwilling to
5 recognize the purpose of IGRA, economic
6 development in Indian Country, that that leverage
7 be taken away.

8 So, as Reuben Mathias said earlier,
9 likewise the tribes in Montana look forward and
10 not back. They look forward to the day when they

11 can have better employment opportunities. They
12 look forward to that time and many other things
13 have been tried in terms of economic development.

14 The other thing is that from those
15 gaming operations, those small modest operations
16 that are out there, tribes are already looking at
17 how to diversify that dollar, not just
18 concentrating on gaming as the only game in town
19 but taking that gaming dollar and turning it into
20 convenience stores, taking that gaming dollar and
21 doing other things with it.

22 What few dollars are left over after

1 necessary services, the ability to take what few
2 dollars are left to maybe do something else, but

3 to take away a gaming opportunity that's
4 currently viable to create something that won't
5 attract a customer to a rural isolated area, I
6 think is poor federal decisionmaking.

7 What the issue is about for two of the
8 tribal leaders that I work with is purely a
9 sovereignty issue as well. It's a failure of our
10 federal partner to recognize what was perceived
11 initially to be a regulatory partnership, that
12 tribes be the primary regulators, that NIGC would
13 have some oversight in terms of code
14 responsibility in the area of Class II, but that
15 we would be partners in regulation, but that's
16 not what's happening here, gentlemen.

17 What's happening here is big brother is
18 telling tribes how to do business rather than
19 affording our regulatory bodies, our commissions
20 into making some of these decisions and building
21 that administrative record on what is a Class II
22 or a Class III device. No, big brother's going

1 to come in and tell us how it should be done.

2 That's intruding on tribal sovereignty. That is

3 not improving tribal self-sufficiency. That is

4 not good tribal self-government.

5 Thank you.

6 CHAIRMAN HOGEN: Thank you, Mr. Decker.

7 (Applause.)

8 CHAIRMAN HOGEN: Further comments or

9 questions? Yes, sir?

10 MR. COLEMAN: Mr. Hogen, Mr. Choney,

11 Bill Coleman again from the Nooksack Tribe.

12 I've been up here a couple of times to

13 talk to you. My voice has broke up a couple of

14 times and I don't know why I need to be nervous

15 to talk with you. I've talked to a lot of bigger

16 audiences before and stuff like that, but nothing

17 is going to compare when I go home, and I have to
18 talk to my elders.
19 My elders, they have been on councils
20 before. My aunt and my uncle, they're going to
21 ask me what did you accomplish there, and I want
22 you, this being my final statement, just for

329

1 everybody here that is representing tribes, their
2 people, their relatives, what are you going to
3 give to us to bring back to be a witness for you
4 to tell these people that we accomplished today?
5 They're going to ask me. Did you look them in
6 the eyes? Did you see their Indian teachings?
7 Did they hear what you needed to say?
8 So, when I go back to Washington State,
9 when I go back to sit down and eat with my

10 elders, they're going to want to know. You spent
11 a lot of money, Bill, going over there to see
12 them people. What did you get done? Let's give
13 us the help here in this audience and say we
14 accomplished something.

15 Thank you.

16 CHAIRMAN HOGEN: Thank you.

17 (Applause.)

18 MR. KERNS: Mr. Chairman, Commissioner
19 Choney.

20 Randy Kerns. I'm with Planet Bingo, and
21 I have handled our regulatory compliance.

22 I'd just like to comment very briefly on

1 a couple of points that I've heard today. My

2 background is regulation of gaming from the State
3 of Washington. I worked for the Washington State
4 Gambling Commission for many years. I was also a
5 police officer in the City of Kemp, Washington,
6 when the Washington State RCW, Revised Code of
7 Washington, 946 was passed authorizing gambling
8 in the state.

9 I'm one of the people that saw bingo
10 grow from people actually playing and seeing them
11 play with beans on hard cards to shutter cards to
12 paper cards, and every iteration of that sped up
13 the game. Everything created more decisions
14 which decisions bring more money for players and
15 for the operation. The more games you can play
16 an hour, the more prizes you can offer, the more
17 revenue goes into the coffers of the organization
18 running the gaming.

19 The issue with that, you graduate from
20 that to seeing the electronics come in during my
21 career. The electronics take the place of the
22 paper. That's all they're doing. If you're

1 still playing bingo, like Eric Casey said, if
2 you're playing bingo and it meets the definition,
3 it's session bingo.

4 The other issue that I'd like to talk on
5 is games with predrawn numbers. That's a bonanza
6 game. Those games were in place in the State of
7 Washington in 1974, right after gaming was
8 legalized. They're still played in the State of
9 Washington today and in many other markets.

10 I certainly haven't seen anything that I
11 would classify in them as evil over all the
12 years, and I would also say that they predate
13 IGRA in virtually all the regulated environments
14 in the states that I know of by a number of years
15 and as such would be a commonly-played game of

16 bingo at the time IGRA was passed, and I'm pretty
17 comfortable with that because one of the
18 architects of IGRA was Senator Dan Evans from the
19 State of Washington who happened to be Governor
20 Dan Evans when gambling was authorized in the
21 State of Washington and he's a very strong
22 student of any legislation that he signs.

332

1 That's all.

2 CHAIRMAN HOGEN: With respect to the
3 predrawn number proposition, much has been said
4 about these three elements that's in the Indian
5 Gaming Regulatory Act that relate to bingo, that
6 just those ought to be relied on, and one of
7 those says that the players cover their numbers
8 when they are called.

9 Now, how do you square that with
10 predrawn numbers?

11 MR. KERNS: How it has been squared that
12 I'm aware of in the state regulations is you
13 predraw a set of numbers that is not going to
14 create an automatic winner and then you draw on
15 from there.

16 The whole idea behind the game
17 originally, to have predrawn numbers where you
18 sold cards, was to increase sales. What you were
19 trying to do with creating that set was you sold
20 the sealed cards, the players opened them up and
21 looked at them. The player said, oh, gee, I
22 don't have much of a chance with these first 24

1 or 30 or 40 numbers, whatever was chosen to be
2 predrawn. The player then went and they traded
3 that card back in with some more money, which
4 generated more sales and better prizes for that
5 particular game for the organization. The game
6 was then determined by the drawing of additional
7 numbers off of that predetermined set in order to
8 achieve a winner.

9 CHAIRMAN HOGEN: Thank you for that
10 explanation, and I think we understand that, but
11 I don't think the environment in which the
12 bonanza bingo is played is constrained by that
13 language, cover when the number is called, but
14 nevertheless, we understand your point, and with
15 respect to converting from paper to electronic, I
16 mean, with paper, you cover your numbers when
17 they're called and that, I think, would need to
18 be true in the electronic format as well and
19 that's the approach we're trying to take.

20 MR. KERNS: Wouldn't disagree with you
21 there, Mr. Chairman.

22 CHAIRMAN HOGEN: Thank you. Mr.

1 Webster?

2 MR. WEBSTER: Yes. Mr. Chairman, I just
3 want to make a brief comment about the one issue
4 because I know that's one that we certainly
5 looked at extensively and discussed with your
6 staff extensively over the years.

7 The way that we square it is you look at
8 the word "win," if you look at the dictionary
9 definition, one of the dictionary definitions of
10 win is if, it's conditional. So, you cover the
11 space on your card when, if a matching number is
12 drawn or electronically determined.

13 So, we don't see any inconsistency.

14 It's not a time issue. It's not a temporal

15 thing. It's not saying you have to do it at the
16 same time. It's saying that you cover if there's
17 a matching number that's drawn or electronically
18 determined, and certainly it's consistent with
19 the Indian Canon of Construction to interpret it
20 in the light most favorable to the tribes. We
21 think that that is the reading that should be --
22 the meaning that should be given to it.

335

1 Thank you.

2 CHAIRMAN HOGEN: Thank you. Further
3 comments or questions?

4 (No response.)

5 CHAIRMAN HOGEN: Well, if there are
6 none, Commissioner Choney, do you have any
7 concluding remarks?

8 COMMISSIONER CHONEY: Yes. I want to
9 just give you our appreciation or my appreciation
10 for your questions and comments. I know they
11 came from the heart, and I know you have your
12 tribal members and your gaming operations at
13 heart.

14 However, I have picked up the perception
15 that you seem to think we already have our minds
16 made up. Well, I want to assure you right now
17 that we don't.

18 What I've heard today, what I've heard
19 for the last two months on the consultation,
20 actually goes back further than that, as far back
21 as two years ago when we started all of this,
22 we're listening to these comments and opinions

1 from everyone and no, we do not have our mind
2 made up. If we did have our minds made up, we
3 would not be sitting here today.

4 One other comment I would like to make
5 is our advisory committee that we empaneled. We
6 received a letter or I saw a letter yesterday
7 signed by one of the members of that panel, he
8 was on the first panel today, basically saying
9 that we did not list any input that they had, any
10 input that they provided.

11 Well, he was a little premature in
12 writing a letter like that. I think he should
13 write a letter like that after we release the
14 final draft or whatever we wind up doing in this
15 and so I want to just rest assure everyone we do
16 not have our mind made up.

17 Concluding Comments

18 CHAIRMAN HOGEN: I, too, want to thank
19 everyone that came to speak and everyone that
20 came to listen and want to assure you that, you
21 know, not only did I listen but hopefully I heard

1 I would like to, you know, be popular
2 and I'd like to give you everything that you ask
3 for, but the oath that I took doesn't permit me
4 to always give the popular response or popular
5 answer. Try to find the right answer and that's
6 exactly what I'm going to try and do.

7 The information that we received was
8 extremely helpful, and it covered the full
9 spectrum. I know the plight of the Kickapoo of
10 Texas and I know how unfair the environment is in
11 which they operate there. I know what Poarch
12 Creek is up against there when the state won't
13 come to the table and there seems to be

14 challenges at every turn and then along comes
15 NIGC and says, well, we're going to tighten this
16 up some more.
17 We're going to try and do the right
18 thing. We're going to look at the law, you know.
19 Senator Evans was mentioned here a moment ago. I
20 was on the airplane when I flew back from South
21 Dakota here this weekend reading the Senate
22 debate on IGRA in 1988. Senator Brock Adams also

338

1 from Washington was one of the participants in
2 that debate.

3 Never once was technology and Class II
4 mentioned. I think the only subject that touched
5 on that in the Floor debate on the Senate was
6 Senator Harry Reid who was concerned about the

7 fact that the Johnson Act would still comply.

8 If you read just the Floor debates, and

9 I know that's not all of the legislative history,

10 you'd come away, I think, with the feeling that

11 they were categorizing casino gaming, whatever

12 that is, in one category and bingo in another.

13 So, I'm going to consider that and I'm

14 also going to very seriously consider all of the

15 heartfelt testimony that's been given here and

16 the statements and the questions, and we also

17 look forward to anything further that might be

18 sent to us between now and September 30th, and we

19 will certainly consider if September 30th is a

20 premature time to call that to a conclusion.

21 So that being said, I want to thank you

22 very much for your participation and please wish

1 us well because we need all the help we can get

2 as we try to get to the right place.

3 Thank you. Hearing is adjourned.

4 (Whereupon, the public hearing was

5 adjourned at 5:15 p.m.)

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